82-898

No._____

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IN THE

Supreme Court of the United States

October Term, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION, et al.,

Appellees,

v.

LEON W. KNIGHT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

JURISDICTIONAL STATEMENT OF APPELLANT MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES

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November 30, 1982

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QUESTION PRESENTED

The Minnesota Public Employment Labor Relations Act, Minn. Stat. §§ 179.61-179.76 (1980) (PELRA) provides that a public employer meet and confer with the exclusive representative of each of its professional employee bargaining units to discuss policies and other matters relating to their employment that are not terms and conditions of employment. This meet and confer process is distinguishable from the collective bargaining process which involves the formal negotiations of terms and conditions of employment. Faculty members at the Minnesota community colleges are professional employees who are represented by the Minnesota Community College Faculty Association (MCCFA). The Appellees, plaintiffs below, are community college faculty members who are represented by but are not members of the MCCFA. The community colleges are under the jurisdiction of the Appellant, Minnesota State Board for Community Colleges (MSBCC), a state agency subject to the provisions of PELRA. The question presented in this appeal is whether the First Amendment interests of Appellees are impermissibly infringed under the provisions of PELRA, Minn. Stat. §§ 179.66, subd. 7 and 179.73, subd. 2 (1980), and under the collective bargaining contract if the exclusive representative has sole authority to select representatives for participation in the meet and confer process and where the exclusive representative's practice has been to appoint only its members to its meet and confer committees.

PARTIES TO THE PROCEEDING

The caption of this case which contains the names of all parties to the proceeding before the three-judge United States District Court whose judgment on the above-stated question Appellants seek to have reviewed is as follows:

Leon W. Knight, Morgan Kjer, Donald A. Dahlin, James D. Wallace, Terrence D. Florin, William B. Bauman, Harold J. Gardner, Thomas J. Patin, Eugene D. Mielke, Dr. Richard A. Thompson, David R. Grout, Joan M. Farkas, Gary Lee Nelson, Ronald Lievense, Lucille Johnson, Virginia E. Lanegran, Max A. Malmquist, Ralph G. Powell, Richard D. Isenhart, Cresston Gackel, Plaintiffs.

v.

Minnesota Community College Faculty Association; Minnesota Education Association; Independent Minnesota Political Action Committee for Education; National Education Association; James A. Norman, individually and in his former official capacity as President, Minnesota Community College Faculty Association; James K. Durham, individually and in his official capacity as Vice President, Minnesota Community College Faculty Association; Robert Bell, individually and in his official capacity as Secretary, Minnesota Community College Faculty Association; Calvin Minke, individually and in his official capacity as Treasurer, Minnesota Community College Faculty Association; Ralph S. Chesebrough, individually and in his official capacity as Executive Secretary, Minnesota Community College Faculty Association; Donald Holman, individually and in his official capacity as Minnesota Education Association Representative, Minnesota

Community College Faculty Association; William M. Mondale, individually and in his former official capacity as President, Minnesota Education Association; James Rosasco, individually and in his former official capacity as President, 1973-1974, Minnesota Education Association; Alfred F. Provo, individually and in his former official capacity as Treasurer, Minnesota Education Association; Albert L. Gallop, individually and in his official capacity as Executive Director, Minnesota Education Association; Fulton B. Klinkerfues, individually and in his former official capacity as President, Independent Minnesota Political Action Committee for Education; Janet R. Morgan, individually and in her former official capacity as Vice President, Independent Minnesota Political Action Committee for Education; John W. Schutt, individually and in his official capacity as Treasurer, Independent Minnesota Political Action Committee for Education; James A. Harris, individually and in his former official capacity as President, National Education Association; Helen D. Wise, individually and in her former official capacity as President, 1973-74, National Education Association; Catherine O'C. Barrett, individually and in her former official capacity as President, 1972-1973, National Education Association; Terry E. Herndon, individually and in his official capacity as Executive Secretary, National Education Association; Sam E. Lambert, individually and in his former official capacity as Executive Secretary, 1972-1973, National Education Association; Raymond Crippen, Rosemary McVay, John Sontorovich, Hugh V. Plunkett III, Arleene Nycklemoe, Douglas Alan Bruce, Ronald H. Denison, Edward G. Ziegler, Val Bjornson, Charles Swanson, in-

dividually; Phillip C. Helland, individually and in his official capacity as Chancellor of the Minnesota Community Colleges; John F. Helling, individually and in his official capacity as President, North Hennepin Community College; Dale A. Lorenz, individually and in his official capacity as President, Normandale Community College; Neil Christenson, in his official capacity as President, Anoka-Ramsey Community College; Wayne S. Burggraaff, in his official capacity as Minnesota Commissioner of Finance; James Lord, in his official capacity as Minnesota State Treasurer; Peter Obermeyer, in his official capacity as Director of the Minnesota State Bureau of Mediation Services; Willard H. McGuire, in his official capacity as President, National Education Association; Roger Johnson, in his official capacity as Chairman, Independent Minnesota Political Action Committee for Education; Donald C. Hill, in his official capacity as President, Minnesota Education Association, Toyse Kyle, Elma Ponto, Joseph Norquist, Nadine Chase, Paul Brinkman, in their official capacities as members of the Minnesota State Board for Community Colleges, Defendants.

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MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION, et al.,

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OPINION BELOW

The opinion of the three-judge United States District Court has not been officially reported. It is set forth in the Appendix at p. A-7. The District Court's Findings of Fact are set forth in the Appendix at p. A-32.

JURISDICTION

The Minnesota State Board for Community Colleges appeals from the judgment entered on March 31, 1982 of a three-judge United States District Court convened pursuant to 28 U.S.C. §§ 2281, 2284. Post-trial motions for relief from judgment, for a new trial, to alter or amend the judgment, and for a hearing on an award of attorneys' fees were denied by the Court on August 13, 1982. Appendix at p. A-1. The Court granted Appellees (plaintiffs below) declaratory and injunctive relief from those Minnesota statutes and corresponding provisions in a collective bargaining contract which the Court held violated plaintiffs' First Amendment rights. The Court ruled that insofar as PELRA is applied to permit the MCCFA exclusive control over which faculty members serve on its meet and confer committees, it has a chilling effect on Appellees' associational and speech interests and is not supported by compelling state interests. Memorandum Opinion and Order, Appendix at p. 17.

A notice of appeal to this Court was filed in the United States District Court, District of Minnesota, Fourth Division, on October 1, 1982. Appendix at p. A-82.

This appeal is being docketed with this Court within 60 days from the filing of the Appellant's notice of appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS, STATUTES

This appeal involves the following federal and state laws:

First Amendment, United States Constitution, as it relates to freedom of speech and association:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

Fourteenth Amendment, United States Constitution, to the extent it makes the First Amendment applicable to the states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minn. Stat. § 179.66, subd. 7 (1980):

> The employer shall not meet and negotiate or meet and confer with any employee or group of employees who are at the time designated as a member or part of an appropriate employee unit except through the exclusive representative if one is certified for that unit or as provided for in section 179.69, subdivision 1.[1]

The foregoing sections and other relevant sections of PELRA are set forth in the Appendix at p. A-87.

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[1] The Minnesota Legislature amended Minn. Stat. § 179.66, subd. 7 in 1982 by adding the following clause at the end of the existing language quoted above: "provided that this subdivision shall not be deemed to prevent the communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is a part of the employee's work assignment." Minn. Laws 1982, ch. 568, § 2.

STATEMENT OF THE CASE

This case involves a challenge to the constitutionality of Minnesota's Public Employment Labor Relations Act, Minn. Stat. §§ 179.61-179.76 (1980). The primary issues ultimately considered by the District Court were: (1) whether it was constitutional, under the First and Fourteenth Amendments to the United States Constitution, for the MCCFA to act as the Appellees' exclusive representative pursuant to the collective bargaining provisions of PELRA; and (2) whether the meet and confer provisions of PELRA are constitutional on their face and as applied to Appellees under the First and Fourteenth Amendments. Memorandum Opinion and Order, Appendix at p. A-7. With regard to the first issue, the Court below upheld the constitutionality of state statutes establishing the use of exclusive representatives in collective bargaining and the constitutionality of the MCCFA serving as the exclusive representative. With regard to the second issue, the Court struck down on First and Fourteenth Amendment grounds the exclusivity of the exclusive representative in the meet and confer process set forth in section 179.66, subd. 7 and in sections of the collective bargaining agreement because of the resultant restrictions on the Appellees' access to the meet and confer process. It is the second issue which is the subject of this appeal by the MSBCC.

Appellant MSBCC is an agency of the State of Minnesota, and, under PELRA, is a "public employer" responsible for the management, jurisdiction and control of the state's community colleges. At the time of trial there were 18 community colleges in the State of Minnesota, each being a public two-year post-secondary educational institution. Appellees are faculty members at the community colleges and are, therefore, members of a bargaining unit under PELRA repre-

sented exclusively by the MCCFA. While Appellees are represented by the MCCFA, they are not members of the MCCFA.

PELRA imposes upon the public employer a duty to "meet and confer" with professional employees to discuss educational policies and other matters that are not terms and conditions of employment. Minn. Stat. §§ 179.66, subd. 3 and 179.63, subds. 15 and 18 (1980). The Minnesota Legislature recognized that professional employees could provide assistance to the public employer in making policy decisions and therefore it required this mutual exchange of ideas which is the essence of meet and confer. Minn. Stat. § 179.73, subd. 1 (1980). Nevertheless the administration retains its exclusive authority to make policy decisions. When the exclusive representative has been certified, the employer is not permitted to formally meet and confer with a member of the bargaining unit except through the exclusive representative. Minn. Stat. § 179.66, subd. 7 (1980). But informal communication with the administration by any faculty member outside of the meet and confer process is permitted regardless of his associational status.

The MCCFA and Appellant MSBCC have entered into biennial collective bargaining agreements since 1973. For present purposes, those agreements have been substantially identical in providing for meet and confer committees on both system-wide and individual campus levels.[2] The contracts have provided in pertinent part as follows:[3]

---

[2] The committees are called "exchange of views" committees at the local level and "meet and confer" committees on the system-wide level. The statute and the Court below referred to both levels of committees as "meet and confer." The term "meet and confer" shall similarly be used herein to describe committees on a campus as well as a system-wide level.

[3] All relevant sections of the Employment Contract between the MCCFA and MSBCC for 1981-1983 have been set forth in the Appendix at p. A-96.

ARTICLE I
RECOGNITION

The Employer recognizes the Association as the exclusive bargaining representative for all . . . employees of the designated bargaining unit.

The Employer will not during the life of this Contract meet and negotiate or meet and confer relative to terms and conditions of employment with any employee or group of employees who are covered by this Contract except through the exclusive bargaining representative. . . .

* * * *

ARTICLE VI

Section 6. *Association State Committee.* The State Association shall establish a committee of no more than eight members to meet and confer with the Minnesota State Community College Board for discussion and mutual exchange of ideas regarding statewide matters which are considered significant by the State Association or the Employer. The Employer shall provide the facilities and set the time for such conferences to take place, and such conferences shall be held at least three times a year. Agenda will be prepared and distributed one week in advance by the Board President or designee and will include all items submitted by the State Association. The agenda shall also include all items submitted by the Board President.

It has been the practice of the MCCFA to select only its members to serve on the faculty meet and confer committees.

The subjects considered at meet and confer sessions are those matters which are not terms and conditions of employ-

ment. Topics such as budgetary planning, new course proposals and other curriculum matters, degree requirements, student activity budgets, academic standards, and teacher evaluation have been subjects of meet and confer. Prior to the passage and implementation of PELRA, college policy matters were generally dealt with through college governance systems in which faculty members had an opportunity to participate.

PELRA is a result of the state's policy of promoting orderly and constructive relationships between all public employers and their employees. Minn. Stat. § 179.61 (1980). It provides for exchange of views through the exclusive representative. The Court below recognized that PELRA is a means by which the state can deal with its employees in a fair, efficient and peaceful manner. The Appellees stipulated and the Court found that creating a procedure of exclusive representation under PELRA furthers numerous state interests. Findings of Fact, Appendix at p. A-52. Included in the state's interests in a system of exclusive representation are avoidance of confusion, of conflicting demands, and of dissension which would result from more than one representative of the faculty, and maintenance of labor peace.

PELRA does not deprive non-members of MCCFA such as the Appellees of opportunities to speak freely and openly. While the formal meet and confer process provides a mechanism for mutual faculty-administration communication, all professional employees have the right to communicate their views to administrators and others outside of the meet and confer process.

In addition, PELRA neither mandates nor directs the process by which the persons on the committees are chosen. Nor does any community college administrator or MSBCC mem-

ber play a role in the selection of the members on the committees. There is no state statute or policy against including nonmembers of MCCFA on such committees.

In spite of the fact that the District Court recognized the state's interest in working through an exclusive representative and the opportunity available to all, including the Appellees, to speak as they wish, the Court found that the MCCFA's practice of excluding non-members from direct participation in the meet and confer process infringes on First and Fourteenth Amendment rights of the Appellees. However, the Court below recognized the state's interest in maintaining an orderly process for meeting and conferring with its employees. Therefore, the meet and confer process was declared valid so long as the state provides all faculty members with a fair opportunity to select and serve as committee members.

SUBSTANTIALITY OF QUESTION

On this issue of first impression the three-judge District Court (Judge Earl Larson dissenting) held "that when the state compels creation of a representative governance system in higher education and utilizes that forum for ongoing debate and resolution of virtually all issues outside the scope of collective bargaining, it must afford every faculty member a fair opportunity to participate in the selection of governance representatives." Memorandum Opinion and Order, Appendix at p. A-23. In reaching its decision on the meet and confer issues, the Court below, in effect, found that where a statutory meet and confer system is in effect, each faculty member of a public institution of higher education must be provided under the First and Fourteenth Amendments a right to par-

ticipate in the administration of that institution. The decision, if permitted to stand, creates new and wide ranging First Amendment rights for college faculty. These rights extend beyond anything previously recognized by this Court.

A. Faculty Members Of A Public Educational Institution Do Not Have A First Amendment Right To Meet And Confer With Their Employer Or Its Administrators.

In Minnesota under PELRA, a public employer such as the MSBCC is required to meet and confer with its professional employees. The faculty is thereby given an opportunity to enter into a dialogue with the administration on policy matters. This statutory right of faculty representatives to participate in administrative decision-making does not give rise to a First Amendment right of each faculty member to participate in that process. The constitutional and statutory rights are separate and distinct from one another. The former involves the right to speak, while the latter involves a mandated and structured dialogue or interaction between the parties.

This Court in *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979), addressed itself to the distinctions between the First Amendment right to speak and a statutory right obligating the employer to listen, respond, and consider:

> The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. . . . But the First Amendment does not impose any affirmative ob-

> ligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.

441 U.S. at 465. *Accord, Henrico Professional Fire Fighters v. Board of Supervisors of Henrico County*, 649 F.2d 237 (4th Cir. 1981) and *Clifford v. Moritz*, 472 F. Supp. 1094 (S.D. Ohio 1979).

Thus, in analogous cases, there is no constitutional entitlement to force a public employer to sit down and exchange views on public policy with its employees. *See Hanover Township Federation of Teachers, Local 1954 v. Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972); *see Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D.Wis. 1974). The Court in the instant case failed to reconcile its decision on this issue with the existing body of cases tending to support the contrary conclusion. Since the First Amendment does not require the state to engage its employees in a dialogue, the fact that a dialogue is permitted by state law with some employees does not give the remaining employees a constitutional right to participate either directly or indirectly.

In ruling that PELRA's meet and confer process gives rise to a First Amendment right, the District Court did not cite any other court's decision. In fact, the Court completely ignored the weight of authority to the contrary. For example, while public employees have a First Amendment right to speak to the matters about which negotiations are concerned, there is no *constitutional* right to participate in the collective bargaining sessions. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *see City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). In fact, there is no constitutional right to engage in collective

bargaining at all. *Smith v. Arkansas State Highway Employees, Local 1315, supra*; *Hanover Township Federation of Teachers, Local 1954 v. Hanover Community School Corp., supra.*

In *Abood v. Detroit Board of Education, supra*, this Court considered a challenge by public school teachers on First and Fourteenth Amendment grounds to an agency shop arrangement authorized by a Michigan statute very similar to Minnesota's PELRA. This Court in *Abood* laid to rest any questions of the constitutionality of collective bargaining. The District Court affirmed the use of an exclusive representative under PELRA, holding that "*Abood* squarely upholds the constitutionality of exclusive representation bargaining in the public sector." Order, Appendix at p. A-4. In *Abood*, the apparent conflict between the employees' First Amendment rights and the statutorily imposed use of an exclusive agent in collective bargaining was resolved. This Court stated:

> A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint. Besides voting in accordance with his convictions, every public employee is largely free to express his views, in public or private, orally or in writing.

431 U.S. at 230.

In the instant case, the employer may similarly meet with the exclusive representative in the meet and confer sessions without violating an excluded faculty member's First Amendment rights so long as that employee is otherwise free to express his views, publicly or privately. The Court below found that the Appellees have the right to communicate freely and to express their individual views to their employer. Find-

ings of Fact, III, B. Appendix, at p. A-50. In addition, no restrictions limiting Appellees' access to administrators at MSBCC outside of meet and confer have been imposed by PELRA. *See* Minn. Stat. § 179.64, subd. 1 (1980). The Appellees' First Amendment rights as heretofore set out have been honored by the Appellant. But the District Court decision recognizes a new First Amendment right to participate in college administration which is contrary to prior decisions of this and other federal courts.

B. The First Amendment Does Not Require That An Academic Forum Be Provided For The Speech Interest Of Each College Faculty Member.

The District Court recognized that meet and confer sessions were not forums open to public participation but it still held that the Appellees were entitled to participate therein. Memorandum Opinion and Order, Appendix at p. A-22.

The limitation that the meet and confer sessions be conducted only through the exclusive representative demonstrates the intended creation of a non-public forum functioning as part of the formal relationship between employer and employee. Numerous provisions concerning meet and confer have been negotiated between the MCCFA and the State of Minnesota and are included in the Employment Contract, Appendix at p. A-96. This Court in *Abood v. Detroit Board of Education, supra* found no obligation on the part of the public employer to grant to the public employee access to the collective bargaining sessions established under Michigan labor relations law. *Abood* distinguished its approval of a system of exclusive representation from its holding in *City of Madison v. Wiscon-*

sin Employment Relations Commission, supra. In *City of Madison,* public employees, like other citizens, had the right to express their views at a public school board meeting. There the forum was open to the public and the public employee was given the same rights as any other citizen. In the present case, the forum is like the one in *Abood* in that it is not open to public participation and should not be open directly or indirectly to the Appellees.

A state has no obligation to create a forum for its employees to advocate their views. *Winston-Salem/Forsyth County Unit of North Carolina Association of Educators v. Phillips,* 381 F. Supp. 644 (M.D. No.Car. 1974). In that case, a teachers' organization in a public school challenged a state law voiding contracts between public employers and public employee unions. In reaching its decision that the constitution does not mandate that the government be compelled to talk to or contract with a labor association, the Court stated:

> While the First Amendment may protect the right of plaintiffs to associate and advocate, not all of their associational activities have the protection of that amendment. The state is not required to provide plaintiffs with a special forum in order to advocate their views.

Id. at 646. *Accord, Connecticut State Federation of Teachers v. Board of Education Members,* 538 F.2d 471 (2nd Cir. 1976). *See also, Reid v. Barrett,* 467 F. Supp. 124 (D.N.J. 1979). Similarly, on the campus of a post-secondary educational institution, the First Amendment does not require the creation of a public forum. *Widmar v. Vincent,* 102 S.Ct. 269 (1981).

The meet and confer sessions to which Appellees demanded access are statutorily established meetings in which only cer-

tain administrators and those representatives selected by the exclusive representative are permitted to engage in the mutual exchange of ideas. The forum is not one open to public participation. On the other hand, Appellees have available to them alternative opportunities for communication with the employer and its representatives. As long as these alternative methods are available and the desired forum is not public, the Appellees' First Amendment rights have been preserved. *Connecticut State Federation of Teachers v. Board of Education Members, supra.*

C. Speech Involved In Meet And Confer Sessions Is Not Included Under Principles Of Academic Freedom.

In reaching its decision below, the District Court panel expanded the scope of the First Amendment by equating faculty governance, i.e. the dialogue required under the meet and confer provisions, with the academic freedom traditionally afforded to teachers in their classrooms. While this Court has long supported the idea that teachers and their students "must always remain free to inquire, to study and to "evaluate", it has never extended the principles of academic freedom to encompass direct or indirect participation in the governance of the educational system itself. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Cases involving the issue of academic freedom highlight society's interest in encouraging an atmosphere of "speculation, experiment and creation." *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978). In an effort to preserve these time honored traditions, this Court has held that regulations and statutes proscribing utterances or acts of teachers and teacher candidates were violative of First Amendment rights, *Keyishian v. Board of*

Regents, 385 U.S. 589 (1967); that a statute requiring the filing of an affidavit listing names of associations to which each teacher belonged or contributed was an unconstitutional limitation of associational freedoms guaranteed by the constitution, *Shelton v. Tucker*, 364 U.S. 479 (1960); and that questions by an attorney general concerning the content of a professor's lectures and his knowledge of certain areas were an invasion of his academic freedom in the classroom, *Sweezy, supra*. In these three cases, which are typical of those in which academic freedom is an issue, the invalid act, regulation, or statute was viewed by the Court as an attempt by the government to directly impair the flow of ideas in the classroom.

The present matter does not involve the suppression of ideas in the classroom. In addition, the issue does not encompass the right of the teacher to speak freely. Faculty members at the community colleges have the right to speak freely on all issues. In fact, rather than having their speech restricted, the Court below found that Appellees have available other opportunities and forums for communicating with their employer and that they have utilized these opportunities. Findings of Fact, III. B., Appendix at p. A-50. It has been determined that "[t]he existence of reasonable alternative means of communication further eviscerates plaintiffs' theory . . ." that altering or removing a particular forum for speech violates the Constitution. *Reid v. Barrett, supra* at 128. *Accord, Connecticut State Federation of Teachers v. Board of Education, supra.*

This Court has defined the free speech rights of a public school teacher as being comparable to those rights enjoyed by any other citizen. Thus in the *City of Madison, supra*, the Court stated:

> We have held that teachers may not be "compelled to relinquish the First Amendment rights they would other-

> wise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."

429 U.S. at 175, citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Similarly, in *Abood v. Detroit Board of Education, supra*, this Court again equated the rights of public school teachers with those of non-public employees generally. There, plaintiffs, Michigan public school teachers, who were members of a bargaining unit represented exclusively by an employee organization, challenged a statutorily authorized agency shop provision of the collective bargaining agreement. The primary basis for the Michigan teachers' claims rested on their belief that the agency shop infringed on their First and Fourteenth Amendment interests. *Abood* affirmed a system of exclusive representation in the public educational institution. Citing its holding in *City of Madison, supra*, this Court recognized that a public employee may express his views and voice his concerns much the same as other citizens. But, the Court saw no abridgment of the teachers' academic freedom in the formalized procedures through which the exclusive representative spoke for the entire faculty. So too in the present case. There is no restriction on Appellees' academic freedom under the meet and confer process between the MSBCC and the MCCFA. The District Court's reliance on academic freedom as a basis for its decision is incorrect.

D. Restricting Meet And Confer Rights To The Exclusive Representative Serves A Significant Governmental Interest.

The three-judge District Court acknowledged that the state has numerous valid interests in pursuing the meet and confer process set forth in PELRA. Findings of Fact IV.C, Appendix at p. A-52. Consequently, the Court balanced the state's interest of making the meet and confer process an orderly one against what it found to be Appellees' First Amendment right to participate. In fact, since the Court recognized the strong state interest in an orderly process, it did not completely invalidate the meet and confer process. Instead, the Court invalidated the use of the exclusive representative, allowing the meet and confer process so long as all members of the bargaining unit are given an opportunity to select representatives.

Before balancing Appellees' First Amendment rights with the state's justification, Appellees must demonstrate that their First Amendment rights have indeed been infringed. *Connecticut State Federation of Teachers v. Board of Education, supra.* Such balancing is not necessary here since there are no First Amendment rights involved; however, even if Appellees have a constitutional right to participate indirectly in meet and confer with college administrators, the administration's interests in dealing with just the exclusive representative outweigh those rights. *See Abood v. Detroit Board of Education, supra*; *Connecticut State Federation of Teachers v. Board of Education, supra.*

As already discussed, the meet and confer process was initiated to provide state ofifcials with formal and continuing access to professional "knowledge, expertise, and dedication

which is helpful and necessary to the operation and quality of public service. . . ." Minn. Stat. § 179.73, subd. 1 (1980). However, as the District Court admitted, to require the Appellant to meet and confer with each individual faculty member would render the process confusing and unworkable. Consequently, PELRA provides that the professional employees select a representative to meet and confer with the public employer. Minn. Stat. §§ 179.73, subd. 2, 179.76, subd. 7 (1980). The employer's interest in meeting and conferring with an exclusive employee representative is similar in many respects to its interests in negotiating a collective bargaining agreement with an exclusive representative.

In addition, meeting and conferring with an exclusive representative results in less confusion and conflict than might arise if the Appellant were to meet individually with each faculty member or with rival unions, or a committee chosen by the entire faculty. Thus the legitimate interest in maintaining "labor peace" is accomplished through the meet and confer process. In affirming the legitimacy of governmental interests in dealing with an exclusive representative, the Court in *Abood v. Detroit Board of Education, supra,* stated:

> The governmental interests advanced by the agency-shop provision . . . are much the same as those promoted by similar provisions in federal labor law. The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, . . . are no different in kind from the evils that the exclusivity rule in the Railroad Labor Act was designed to avoid . . . the desirability of labor peace is no less important in the public sector. . . .

(Citations omitted). *Id.* at 224. This interest in labor peace, an interest recognized and supported by the Courts, plainly supports the meet and confer process established by PELRA.

CONCLUSON

The decision of the Court below has the effect of undermining this Court's decision in *Abood v. Detroit Board of Education*, and *City of Madison v. Wisconsin Employment Relations Commission*. The holding of the Court below establishes a right which was not previously protected by the First Amendment; it affords public employees in the area of labor relations greater rights than non-public employees, contrary to *Abood*; it mandates responsibilities of the public employer that have not been previously imposed; and it gives faculty members in the community college system governance rights as a matter of constitutional right. For these reasons and for

the reasons stated above, the Minnesota State Board for Community Colleges requests that this Court note probable jurisdiction.

Respectfully submitted,

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82-898

No._____

IN THE

Supreme Court of the United States

October Term, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION,

Appellants,

v.

LEON W. KNIGHT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

APPENDIX TO JURISDICTIONAL STATEMENT OF APPELLANT MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

File No. 4-74 Civ. 659

LEON W. KNIGHT, et al.,

Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, et al.,

Defendants.

ORDER

Before HEANEY, Circuit Judge, ALSOP, District Judge and LARSON, Senior District Judge.

This Court issued its Findings of Fact in the above-captioned matter on November 16, 1981 and its Memorandum Opinion on March 31, 1982. Plaintiffs have filed objections to the findings and conclusions therein and have moved, under Rules 52, 59 and 60, to amend such findings, for relief from judgment and for a new trial. Plaintiffs also have moved for a hearing on the calculation of attorneys' fees to which they may be entitled. Defendants have moved to amend the Court's judgment insofar as it taxes 20 per cent of plaintiffs' costs against the MCCFA and MSBCC. We deny all of these motions.

Defendants' motion to reduce the proportion of costs taxed against them is grounded on their contention that no more than 5-6 per cent of plaintiffs' efforts were expanded on the "meet and confer" issue, the one issue on which plaintiffs prevailed. Plaintiffs have not disputed that the "meet and confer" issue was largely a discrete question of law and fact. Nor have they challenged defendants' assertions that the "meet and confer" issue was addressed in only 3 per cent of plaintiffs' exhibits, 6 per cent of the trial transcripts, .004 per cent of plaintiffs' proposed stipulations and by none of plaintiffs' expert witnesses. Nonetheless, we recognize that there is some overlap between the First Amendment claim as to meet and confer practices and the other practices challenged by plaintiffs. The determination of costs is not a mechanical matter and courts are afforded broad discretion in making such determinations. *Environmental Defense Fund, Inc. v. Callaway*, 497 F.2d 1340, 1342 (8th Cir. 1974). The determination here that the MCCFA and MSBCC shall bear 20 per cent of plaintiffs' costs is a reasonable one and we, therefore, deny the motion to alter that aspect of the judgment.

Plaintiffs' 380 pages of post-trial motions raise numerous detailed issues, nearly all of which were clearly resolved in the Findings of Fact, Memorandum Opinion or other prior rulings of this Court. One claim, for example, is that the findings are false, resting on fraud and "cover-ups" by the defendants. This was raised before the Special Master and was rejected previously by the Master and by this Court. Nothing has been proffered which would give merit to the claim at this stage of the proceedings.

The central objection raised by plaintiffs relates to the conclusion that the defendant labor organizations do not constitute a single, integrated, political-action organization or quasi-

political party. It is asserted that this conclusion rests on a misapplication of the burden of proof, misconstruction of the controlling law, misrepresentation of the record evidence, insufficiently detailed findings and a failure to accept the purportedly "conclusive" opinions of plaintiffs' expert witnesses. Most of these objections are simply an attempt to relitigate the case as a whole, but some clarification may facilitate appellate review of this Court's decision.

The Memorandum Opinion fully sets forth how *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) controls much of the present case. *See* Mem. Op. at 3-7. A major difficulty in this protracted litigation has been the plaintiffs' consistent refusal to acknowledge *Abood* and its impact here. A crucial distinction in *Abood* is whether an exclusive representative's challenged "political" activities are related or unrelated to collective bargaining—only the latter cannot constitutionally be supported by compulsory fair share fees.[1] Here, however, plaintiffs have repeatedly ignored this distinction and in so doing, have obscured the factual issues and the evidence relating thereto. For example, the plaintiffs offered an expert "content analysis" of selected publications which purportedly showed that from 50-100 per cent of the defendants' activities were "political" and did not involve "collec-

[1] This case is not a dispute over calculation of fair share fees, nor does it turn on line-drawing as to activities at the margin of what may be characterized as collective bargaining. When plaintiffs' assertions are viewed in their totality, it becomes clear that under their theory, any private bargaining organization will inevitably constitute an impermissible "political action" organization. Throughout this case, plaintiffs' characterization of MCCFA as a "political" organization has included as a predicate those government-related activities which are inherent in public sector bargaining.

tive bargaining." This analysis rested on subjective judgments which in turn were predicated on the assumption that all "organizing, litigation and lobbying" activities were something separate from "collective bargaining." Apart from other flaws in the content analysis, the fundamental error is the refusal to acknowledge that, consistent with the Constitution, certain organizing and lobbying may be related to collective bargaining and may also, in some broad sense, be deemed "political." Accordingly, the content analysis could be afforded little weight in the face of overwhelming record evidence that the MCCFA is not a quasi-political party but rather is a typical public employee bargaining association.

Plaintiffs' refusal to recognize the effect of *Abood* has needlessly consumed extensive resources. *Abood* squarely upheld the constitutionality of exclusive representation bargaining in the public sector, yet plaintiffs have elaborately developed a theory under which such bargaining is unconstitutional unless the public employees' representative is actually some branch of the government. This theory is frivolous in light of *Abood*, but in any case, could have been fully presented in a cogent manner as a legal question turning on largely undisputed facts. Instead, the development of this theory was muddled with plaintiffs' theory that MCCFA, and probably any public sector union, is the constitutional equivalent of a political party, and was further blurred with repeated incantations that the arrangement under PELRA is the functional equivalent of Italian fascism and the National Industrial Recovery Act. Indeed, the presentation of plaintiffs' case has hindered rather than helped the court to resolve the issues raised in their complaint.

We recognized, however, that important First Amendment interests were implicated and accordingly, placed the burden

upon the defendants to establish that they were not quasi-political parties but instead were public employee bargaining organizations whose activities were predominantly related to collective bargaining. Consideration of this issue was unaided by plaintiffs' insistent and exhaustive attempts to construe as unconstitutional virtually all activity which in any sense may be labeled "political." This again reflects an unwillingness to accept the holding of *Abood*.[2] Notwithstanding this, we closely examined the record as a whole and found that the defendants clearly met their burden. Plaintiffs' contrary assertions at this stage are simply another attempt to litigate matters on which they did not prevail for factual and legal reasons clearly set forth in the Findings of Fact and Memorandum Opinion.

The discussion here should remove any doubt as to the Court's resolution of issues which were also addressed by

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[2] The plaintiffs' post-trial motions in part reveal, for the first time, a nominal recognition that the issue is not whether the MCCFA is predominantly "political," however that may be defined, but whether its activities are predominantly related to collective bargaining, as illuminated in *Abood*. Belated recasting of part of its claim, however, does not change the record evidence nor the only conclusion which is supported by the record. Moreover, plaintiffs' adamant resistance to *Abood* is still reflected in the post-trial assertion that this Court erred by finding the MCCFA to be a "non-political" organization. Whatever the proper definition might be for the term "non-political," no one has contended, and we have never found, that the MCCFA is "non-political." Indeed, as the *Abood* Court noted, the core functions of any public sector union can be characterized as inherently political in some sense of that term. Plaintiffs' true objection is to the holding of *Abood* that exclusive representation bargaining in the public sector is constitutional notwithstanding the inherently political dimension of such activity. Much of the present litigation has been a wasteful attempt to obfuscate and circumvent that clear holding.

plaintiffs' expert witnesses. Plaintiffs insist that the opinion of organizational science experts, political science experts and political economy experts, when unrebutted by similar experts, must be accepted as binding upon the Court. We disagree. The questions addressed by such experts raise factual and legal issues well within the province of any court. The effect of PELRA on "political equality and state sovereignty," for example, is not a question for binding determination by mechanical rules of science, despite plaintiffs' suggestion to the contrary. Whether PELRA is the functional equivalent of any other piece of legislation is similarly a mixed question of law and fact not subject to supposedly dispositive "scientific" testimony. Nor is a "scientific" analogy to fascism binding upon a court. Plaintiffs also emphasize the expert opinion that the defendants constitute an "integrated" entity. The "integration" issue, however, is not a talisman, as plaintiffs would have us believe. The Findings of Fact clearly show certain affiliations between MCCFA and the other defendants and also show that MCCFA independently charts the collective bargaining course it will pursue. Integration is only relevant as it relates to plaintiffs' contention that the defendants are a monolithic "political action" organization, a claim clearly resolved in favor of the defendants. Here again, plaintiffs contend that the opinion of their political science expert is conclusive on the "political action" characterization, notwithstanding that the primary foundation for such testimony, like plaintiffs' case as a whole, utterly fails to account for permissible activity which may in some sense be "political" but which also relates to collective bargaining under the principles of *Abood*.

These expert opinions thus are not binding upon the Court and indeed, in most part were not even helpful to resolution

of the issues presented. Such opinions were given as much weight as appropriate and the weight of the record as a whole explains why they generally were not accepted.

The motions of plaintiffs and defendants are hereby denied. The request of a hearing on attorneys' fees is also denied as premature. Plaintiffs are directed to submit a written request for such fees and defendants are directed to file any objections they may have to such request within thirty days after it is served upon them. The Court will then consider whether a hearing or further submissions may be necessary to its disposition of any fee questions.

GERALD W. HEANEY
United States Circuit Judge
DONALD D. ALSOP
United States District Judge
EARL R. LARSON
U.S. Senior District Judge

Dated: Aug. 13, 1982.

(Caption)

MEMORANDUM OPINION AND ORDER

Before HEANEY, Circuit Judge, ALSOP, District Judge, and LARSON, Senior District Judge.

HEANEY, Circuit Judge.

MEMORANDUM OPINION

Plaintiffs are community college faculty members who challenge the constitutionality of the Minnesota Public Employment Labor Relations Act (PELRA) as applied in the community colleges. Essentially two issues are raised: whether the Minnesota Community College Faculty Association (MCCFA) may act as an exclusive representative under

PELRA, and whether the "meet and confer" provisions of PELRA are valid on their face and as applied. Following extensive proceedings and an independent review of the exhaustive record, we entered findings of fact on November 17, 1981, which are attached hereto. This memorandum opinion incorporates our conclusions of law and order for judgment.

I

MCCFA AS AN EXCLUSIVE REPRESENTATIVE

The structure of collective bargaining under PELRA and MCCFA's role thereunder may be summarized as follows. PELRA provides several mechanisms by which an employee organization may be designated as the exclusive representative of an appropriate bargaining unit. *See* Minn. Stat. § 179.67. The MCCFA is an association of faculty members of the community colleges in Minnesota. It is not disputed that the MCCFA facially qualifies as an employee organization, that community college faculty are an appropriate unit under PELRA,[1] and that the MCCFA was properly certified as an exclusive representative in 1971.

Public employers have an obligation, under PELRA, to "meet and negotiate"[2] with respect to compensation and other "terms and conditions of employment." *Id.*, § 179.66, subd. 2. When an exclusive representative has been certified,

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[1] The certification of community college faculty as a single, statewide bargaining unit was upheld in *Minn. State College Bd. v. Public Employment Relations Bd.*, 228 N.W.2d 551 (Minn. 1975).

[2] The duty to meet and negotiate is defined as:

> the performance of the mutual obligations to meet at reasonable times, including where possible meeting in advance of the budget making process, with the good faith intent of entering into an agreement with respect to terms and conditions of employment; provided, that by such obligation neither party is compelled to agree to a proposal or required to make a concession.

Minn. Stat. § 179.63, subd. 16.

the employer may negotiate only through that representative. *Id.*, § 179.66, subd. 7. The Minnesota State Board for Community Colleges (MSBCC) has negotiated four collective bargaining agreements with the MCCFA since 1971.

Employees are not required by statute to join the MCCFA. Indeed, PELRA expressly provides that employees have "the right not to form [or] join" an employee organization. *Id.*, § 179.65, subd. 2. The contract negotiated by the MCCFA applies to all community college faculty members and its economic benefits flow to all faculty regardless of whether they are members of the MCCFA. PELRA provides that a fair share fee may be collected by an employee organization from nonmember employees that it represents, not to exceed 85% of members' regular dues. *Id.* Such a fee has been collected from plaintiffs by the MCCFA. Determination of the amount of the fee is not in dispute, but we note that PELRA does provide a procedure by which employees may challenge calculation of the fair share fee. *Id.*

The foregoing describes a system of public sector collective bargaining which is common to many states insofar as it applies to traditional subjects of collective bargaining.[3] *See generally*, Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 Mich. L. Rev. 885 (1973). The essential character of such systems is implicated by two claims which the plaintiffs advance here.

A.

Plaintiffs' first contention is that because the MCCFA is a private organization, it holds an impermissible power under PELRA to make "economic laws" and its function constitutes

[3] The "meet and confer" provisions of PELRA fall outside the traditional scope of collective bargaining and are examined *infra* at p. 9.

an impermissible delegation of state sovereignty. Under this theory, only a quasi-state agency—some branch of the public employer—may constitutionally serve as the employee representative. We reject this theory.

The State of Minnesota has not impermissibly delegated its sovereign power. The employer's duty to negotiate under PELRA "does not compel the public employer or its representative to agree to a proposal or require the making of a concession." Minn. Stat. § 179.66, subd. 2. Negotiated agreements with state employees and even arbitration awards must be "submitted to the legislature to be accepted or rejected." *Id.*, § 179.74, subd. 5. Contract terms successfully bargained by the MCCFA have been, in fact, subsequently modified by the state legislature. The state might well find it in its own interest to confer more authority upon its employers or to afford public employees more of the rights held by private employees, but we need not speculate on modifications of PELRA that might occur. It is clear that the present structure under PELRA does not impermissibly abridge the state's sovereign power.

In contending that the legislature's retained authority under PELRA is constitutionally inadequate, plaintiffs rely heavily on *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), and *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Plaintiffs also rely on these cases for the proposition that PELRA confers upon the MCCFA an impermissible power to make "economic laws."[4] The continuing vitality of *Schecter*

[4] The plaintiffs called several witnesses and devoted extensive time and resources to develop the theory that PELRA is the functional equivalent of both the legislation struck down in *Schecter* and *Carter Coal*, and of the "corporate-state model of Italian fascism." These theories are without merit in light of the controlling principles of *Abood*.

and *Carter Coal*, however, is doubtful at best.[5] Moreover, even if *Schecter* and *Carter Coal* might have some vitality in another context, plaintiffs' reliance on them here is clearly foreclosed by the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Abood* squarely upholds the constitutionality of exclusive representation bargaining in the public sector.

Abood is central to this case and warrants elaboration. *Abood* involved a public employee bargaining statute similar to Minnesota's PELRA.[6] The plaintiffs in *Abood* were teachers who had not joined the private employee organization which served as their exclusive representative. Like the plaintiffs here, the teachers objected to compulsory fair share fees on First Amendment grounds. The Supreme Court had previously rejected such claims in the private sector, holding that agency shop arrangements were supported by compelling state interests. *See Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956). In *Abood*, the Court reaffirmed that exclusive representation

> avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-

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[5] *See e.g., Quincy College v. Burlington Northern, Inc.*, 328 F. Supp. 808, 811 (N.D. Ill. 1971) ("The *Schecter* and *Panama* cases have been severely limited to their own facts"); *Simon v. Cameron*, 337 F. Supp. 1380, 1382 n.1 (C.D. Cal. 1970) (*Carter Coal* "has been distinguished and disregarded in recent years to such an extent that it is believed that the Carter non-delegation doctrine is dead"). *See also*, Davis, Administrative Law Treatise, §§ 3:2, 3:8, 3:12 (1980) ("That the literal opinions in the *Panama* and *Schecter* cases do not embody the effective law is entirely clear").

[6] The Michigan statute at issue in *Abood* provided for designation of an exclusive representative and for collection of fair share fees from employees who were represented by, but not members of, the employee organization. *Abood*, *supra* at 212-215.

> union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

Id. at 220-221 (citations omitted).

Moreover, the *Abood* Court reiterated that the agency shop arrangement has been found to "distribute fairly the cost of [collective bargaining] among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free-riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222.

These state policy interests are just as compelling in the public sector. As the Court stated in *Abood, supra* at 224, "[t]he desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller." Although the agency shop in the public sector necessarily impacts on First Amendment rights, the *Abood* Court found such concerns outweighed by the compelling state interests in orderly labor relations. *Id.* at 222-223, 229-231.

The *Abood* decision is controlling here.[7] The State of Minnesota has expressly declared that the purpose of PELRA is "to promote orderly and constructive relationships" between public employers and employees and that such a purpose "may best be accomplished" by the bargaining structure provided

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[7] The concurring opinion in *Abood, supra* at 254, 259 n.13, makes clear that the majority holding forecloses the specific claim of plaintiffs here. Even if we were not bound by *Abood*, however, we would reject the plaintiffs' claim for the reasons set forth herein.

under PELRA. Minn. Stat. § 179.61. As the *Abood* Court noted, such a determination by the state is to be afforded great weight in the constitutional balance. *Abood, supra* at 229. Moreover, such a determination rests on a long tradition in Minnesota of recognizing the importance of the agency shop in resolving traditional subjects of collective bargaining. *See e.g.*, Minn. Stat. § 179.16 (providing for exclusive representation in the private sector since the 1940's); *see also*, Note, *Certification of a Bargaining Representative under the Minnesota Labor Relations Act*, 38 Minn. L. Rev. 827 (1954); Note, *History and Provisions of the Minnesota Labor Relations Act*, 24 Minn. L. Rev. 217 (1940). Minnesota may provide for exclusive representation by an employee association in the public sector and may require that nonmembers of the association financially support its collective bargaining efforts through a fair share fee. No constitutional infirmity arises merely because the employee association is a private organization.

B.

Plaintiffs' second contention rests on a factual assertion that the MCCFA, alone and in conjunction with its affiliates, constitutes a quasi-political party or predominantly a political-action organization. The legal claim is that compulsory fair share fees therefore result in forced association with a political party contrary to *Elrod v. Burns*, 427 U.S. 347 (1976), and its progeny. Our resolution of this claim is again guided by the Supreme Court's decision in *Abood, supra*.

The teacher-plaintiffs in *Abood* argued that bargaining activity of a public sector union is inherently political and that compulsory financial support of such activity therefore violates First Amendment associational rights. The Supreme Court acknowledged that "decisionmaking by a public employer is above all a political process," *id.* at 228, and noted

"[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities * * * may be properly termed political." *Id.* at 231. The Court, however, made clear that such "differences between public and private sector collective bargaining simply do not translate into differences in First Amendment rights."[8] *Id.* at 232. Following the precedent set in the private sector,[9] the Court held that public sector unions may collect compulsory fair share fees notwithstanding the "political" character of public bargaining—so long as the fees "are applied to collective bargaining, contract administration, and grievance adjustment purposes." *Id.* at 232. The crucial distinction is union political activity *unrelated* to collective bargaining. The *Abood* Court held that persons opposing such activity may not be compelled to support it through fair share fees. *Id.* at 235-236.

In attempting to show that the MCCFA is predominantly a political action organization, the plaintiffs have persistently ignored the distinction between activities related and those unrelated to collective bargaining. The plaintiffs have instead insisted that activity of the MCCFA which is in any sense "political" must be considered wholly separate from collective bargaining activity.[10] This approach paints with a brush so

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[8] The plaintiffs here argue that allowing a public sector union to be politically active in any respect will confer an unconstitutional political advantage upon public employees. The *Abood* Court acknowledged that public employees might achieve additional influence through political activity. *Id.* at 228. In upholding public sector bargaining and political activity related to such bargaining, the *Abood* Court found no constitutional significance in this "political advantage" theory. Nor do we.

[9] *See Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956).

[10] *See e.g.*, findings of fact at 12-13.

broad as to obliterate the distinction that the *Abood* Court found to be crucial for constitutional purposes.

We emphasize that the plaintiffs do not advance a narrow claim that some part of their fair share fees are misused for political activity unrelated to collective bargaining. Calculation of the fair share fee is not in dispute here and we note that there is a statutory procedure for resolving any such dispute.[11] The plaintiffs' claim is that the MCCFA and its affiliates are so overwhelmingly engaged in political activity that they must be deemed to be the equivalent of a political party for constitutional purposes. In light of *Abood*, the factual inquiry turns on whether the activities of MCCFA are related or unrelated to collective bargaining. We have placed the burden on the defendant labor organizations to establish that their activity properly relates to collective bargaining.[12]

Extensive evidence was adduced with respect to the activities of the MCCFA and the other defendant labor organizations, the Minnesota Education Association (MEA), the National Education Association (NEA) and IMPACE (a political action committee affiliated with the MEA). Hundreds of exhibits were introduced by plaintiffs and defendants that relate to the character of activity undertaken by the labor organizations. Numerous staff and officers of the organizations testi-

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[11] *See* Minn. Stat. § 179.65, subd. 2. In a challenge to the fair share fee, the burden is on the employee association to justify the determination of the fee amount. *Id.*

[12] The plaintiffs in a constitutional challenge ordinarily have the burden of establishing that a constitutional violation exists. In *Abood*, however, the Supreme Court indicated a special concern for the difficulty that individual nonmembers of a union would face in attempting to trace and account for the use of their fair share fees. Accordingly, we have placed the burden on the defendants here to establish whether their activities predominantly relate to collective bargaining.

fied as to the extent and character of their political activity. We have independently reviewed the exhaustive record developed before the special master. As our findings indicate,[13] the record establishes beyond any doubt that the MCCFA, MEA and NEA are properly characterized as public employee organizations whose political activities relate closely and directly to collective bargaining.

Plaintiffs devoted extensive time and resources to a theory that the MCCFA, MEA, NEA, IMPACE and NEA-PAC (a political action committee affiliated with the NEA) are a single, integrated organization that functions as a quasi-political party. This theory is without merit as a factual matter. IMPACE and NEA-PAC are indeed political action committees, but even members of MEA and NEA do not automatically give support to these committees. These are independent political action committees organized under state and federal law for the purpose of participating in partisan election contests; membership in and support for IMPACE and NEA-PAC is wholly voluntary. MCCFA is affiliated with MEA and NEA and has derived substantial assistance from the latter two organizations during strikes and other collective actions. The MCCFA, however, independently charts its course of collective bargaining on behalf of community college faculty. Finally, even if MCCFA, MEA and NEA were deemed to be in some sense "integrated," the outcome would not change because each of these organizations is predominantly engaged in activities closely and directly related to collective bargaining.

The MCCFA has engaged in legislative activity virtually of necessity because collective bargaining agreements negotiated by the MCCFA must be submitted to the legislature for approval or rejection. *See* slip op., *supra* at 3. There is simply

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[13] *See* findings of fact at 7-13.

no basis in this record, however, on which the MCCFA could be deemed anything other than a public employee organization whose purpose is to improve through collective bargaining the terms and conditions of employment for the college faculty it represents.

The plaintiffs' claim therefore fails in two respects. To the extent it rests on the notion that a public sector labor organization cannot engage in political activity that relates directly to collective bargaining, it is plainly wrong as a matter of law. To the extent it rests on a factual claim that the MCCFA is predominantly engaged in political activity *unrelated* to collective bargaining, it is flatly contradicted by the record. Such activity is not even a significant, much less a predominant, part of the MCCFA's total activity.

II

MEET AND CONFER

PELRA distinguishes traditional subjects of collective bargaining from all other issues that arise between employers and employees. The traditional matters—compensation and other "terms and conditions of employment—are subject to mandatory bargaining in which employers and the exclusive representative of employees must negotiate in good faith to reach an agreement. *See* Minn. Stat. §§ 179.63, subd. 16, subd. 18; 176.65, subd. 4; 179.66, subd. 1, subd. 2, subd. 7. On all matters not subject to this "meet and negotiate" process, professional employees have the express right to "meet and confer" with their employer. *Id.*, § 179.65, subd. 3. Similarly, PELRA imposes a duty upon employers to meet and confer on such matters with professional public employees. *Id.*, § 179.66, subd. 3.

The state interest underlying the meet and confer process is set forth in the statute:

> The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas regarding all matters not specified under [the meet and negotiate provisions].

Id., § 179.73, subd. 1.

As a general matter, the meet and confer concept reflects enlightened labor policy and a legitimate state interest in securing the insight of public employees on questions outside the traditional scope of collective bargaining. There is no constitutional infirmity in requiring public employers to solicit and meaningfully consider the views of public employees.

As applied to higher education, the meet and confer process recognizes and codifies a longstanding tradition of a faculty participation in college governance. In light of this tradition of shared decisionmaking, the state has a special interest in securing the views of faculty members on questions of college governance. No college administrator needs this Court to describe the faculty response to unilateral decisionmaking on issues of importance on campus—the literature in the field is more than sufficient. *See e.g.*, Mayhew, L.B., *Surviving the Eighties*, p. 226 (1979) ("it is really the faculty that grants administrators the mandate to govern, and that mandate can be removed by both overt and covert means"); Ladd & Lipset, *The Divided Academy*, pp. 243-299 (1975); D. Walker, *The Effective Administrator* (1979); H. Mason, *College and University Government*, pp. 44-99 (1972) (suggesting that shared

authority is "the mode of *rapprochement* between bureaucracy and professionalism in institutions of higher education").

Nothing in the Constitution would require that the state abandon what appears to be an essential component of college administration—involving the faculty in a broad range of governance decisions. Thus, no infirmity whatsoever attaches to the threshold meet and confer provisions of PELRA—those which require administrators to meet and confer with faculty and which declare the right of the faculty to meet and confer with administrators. *See* Minn. Stat. §§ 179.65, subd. 3; 179.66, subd. 3.

The state also requires that professional employees select a representative for purposes of the meet and confer process. Minn. Stat. § 179.73, subd. 2. This requirement is separate from the selection of an exclusive representative for purposes of mandatory bargaining.[14] Regardless of whether a bargaining representative has been selected, PELRA requires some selection system for purposes of the meet and confer process. As applied to higher education, this effectively compels the establishment of a faculty governance system to function in the meet and confer process.

The meet and confer committees that presently operate[15] are in fact the exclusive formal governance system for resolving issues outside the scope of mandatory bargaining. The collective bargaining agreement provides, for example, that the

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[14] Minn. Stat. § 179.73, subd. 2, is a one-sentence requirement that is silent as to the method of selecting meet and confer representatives. In contrast, elaborate procedures are set forth elsewhere for selecting an exclusive representative for purposes of collective bargaining. *See* Minn. Stat. § 179.67.

[15] The committees are called "exchange of views" committees at the local campus level and "meet and confer" committees at the statewide level. Use of the term "meet and confer" herein refers to both levels of committees.

meet and confer committees "will have full authority in the assigned area to present the views of the employees * * *." The testimony of college administrators confirms that, although persons may still express their individual views outside the formal process, the "official" view of the faculty is the position adopted by the meet and confer committees. Thus, the weight and significance of individual speech interests have been consciously derogated in favor of systematic, official expression. On any issue that has campus-wide impact, it is difficult to imagine that isolated individual views would have any weight when compared to the "official" view of the faculty. If some faculty members are excluded from participation and deliberation in the meet and confer process, they are effectively denied any meaningful expression on the issues resolved through that process.

The subjects considered by meet and confer committees at the community colleges have included the college budget, curriculum reviews, new course proposals, college organization and campus facilities. Moreover, the scope of the meet and confer process in community colleges sweeps across all issues in college governance that are not subject to mandatory bargaining. These issues in higher education have a special character as a matter of tradition, public policy and constitutional law.

Traditionally, the subjects of meet and confer have been resolved through governance systems in which all faculty members have an opportunity to participate. In the present case, governance at community colleges prior to passage of PELRA consisted of faculty senates and committees, selected through elections in which every faculty member was eligible to both vote and seek election.

Public policy supports the tradition of participation by all faculty members. The free and full exchange of ideas lies at

the core of academia's contribution to our society. To protect these values, our society has attempted to insulate institutions of higher education from the orthodoxies of life outside the campus—be they commercial, religious or political orthodoxies that might inhibit the marketplace of ideas.

The right of expression by faculty members also holds a special place under our Constitution, as the Supreme Court has broadly declared. In *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967), the Court stated:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment.

In *Shelton v. Tucker*, 364 U.S. 480, 487 (1960), the Court emphasized that "[t]he vigilant protection of constitutional freedoms is no where more vital than in the community of American schools." Similarly, in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), the Court declared:

> The essentiality of freedom in the community of American universities is almost self-evident. * * * To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

These cases do not directly control the present matter,[16] but they illustrate that the First Amendment has a special significance in higher education. The vital concern for academic freedom warrants a heightened standard of scrutiny when, as here, the state regulates the forum for academic speech.

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[16] The issue here is whether faculty members may be excluded from participating in selection of meet and confer representatives and from serving as such representatives, which is a question of first impression.

We must weigh these constitutional values against the state interest in making the meet and confer process an orderly one. The state has provided that the right to meet and confer may only be exercised through selection of representatives in a governance system. It vigorously contends that requiring some selection process is essential if the meet and confer process is to be effective. We are inclined to agree. Absent such a requirement, administrators in the community college system would be expressly compelled to meet regularly[17] with each faculty member and group of members that desired to so confer. The result could well be that no meaningful faculty expression would emerge and that both faculty and administrators would be deprived of the benefits from an orderly, systematic exchange of views.

We cannot ignore, however, that the state has created a forum for the exchange of views between faculty and administrators on all issues outside the scope of mandatory bargaining. The meet and confer process may not be a general public forum,[18] but it is an important academic forum. Indeed, it is the only significant forum for the faculty to resolve virtually every issue outside the scope of mandatory bargaining. This structure effectively blocks any meaningful expression by faculty members who are excluded from the formal process. If the state is going to intervene in this manner, we think it must afford all faculty members a fair opportunity both to

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[17] PELRA requires that formal meet and confer sessions be held at least three times a year. *See* Minn. Stat. § 179.73, subd. 2. The spirit and practice, however, have been to meet more often than this, generally on a monthly basis.

[18] If the meet and confer sessions were a public forum, an absolute free speech right would attach in terms of access to that forum. *See City of Madison v. Wisc. Empl. Comm.*, 429 U.S. 167 (1976). *See also*, Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 Minn. L. Rev. 183, 245-249 (1980).

serve as and to participate in the selection of meet and confer representatives. Thus, Minn. Stat. § 179.73, subd. 2, which requires faculty members to select such representatives, is constitutionally valid so long as every faculty member is afforded a fair opportunity to participate in the selection process.

We emphasize the narrowness of this holding.[19] We are not confronted with a faculty governance system developed independent of state compulsion, which would present different considerations. We are not confronted with ad hoc committees or other temporary governance mechanisms which might present special needs for expediency. Nor have we yet addressed what role a faculty union might play in a governance system. We hold only that when the state compels creation of a representative governance system in higher education and utilizes that forum for ongoing debate and resolution of virtually all issues outside the scope of collective bargaining, it must afford every faculty member a fair opportunity to participate in the selection of governance representatives.[20]

The State of Minnesota has gone one step further in structuring the meet and confer process. PELRA provides that the employer may meet and confer "only through the exclusive representative," if there be one. *See* Minn. Stat. § 179.66, subd. 7. Pursuant to this provision, the collective bargaining contract confers upon the MCCFA the sole authority to select the

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[19] This holding, of course, applies only to higher education.

[20] Selection of the present meet and confer committee members, for example, might be conducted under MCCFA auspices in fully open elections—such that members and nonmembers of MCCFA could both vote and seek election. We could not find that such a system deprived anyone of a fair opportunity to participate. To precisely define "fair opportunity," however, would require that we speculate on governance structures that are not before us. We decline to do so.

meet and confer representatives. The MCCFA has held this exclusive power since the passage of PELRA, and has exercised it to exclude nonmembers of the MCCFA from serving on the meet and confer committees.

This practice of systematically excluding nonmembers of the MCCFA obviously deprives such persons of a fair opportunity to participate in the meet and confer process. It also infringes the First Amendment associational rights of faculty members who do not desire to join the MCCFA.

Moreover, the MCCFA's exclusive authority to select the committee representative—regardless of how it is actually exercised—inherently creates a chilling effect on the associational and speech interests of faculty members. The scope of the meet and confer committees reaches many issues that are integral to the professional function of a college professor. If one risks exclusion from these committees by not joining in or speaking out against the MCCFA, it seems self-evident that one's freedom not to join or to so speak out is seriously impaired. This risk of exclusion is inherent in the MCCFA's sole authority to select the committee members. The actual practice only bears out that the risk of exclusion is a real one.

Because these effects infringe fundamental First Amendment guarantees, the MCCFA's exclusive selection authority can be upheld only if it is supported by compelling, legitimate state interests which cannot be furthered by less intrusive means. We find no such interests here.

The state does not contend that it has a legitimate interest in excluding nonmembers of the MCCFA from serving on meet and confer committees. Indeed, the state interest expressly underlying the meet and confer process—obtaining the views of employees on matters outside the scope of collective bargaining—argues for hearing the views of all employees not just

those that are union members. The state does contend that the meet and confer process must be an orderly, systematic one, but this interest can be fully served without excluding nonmembers of the MCCFA. The process would be no less orderly, for example, if both members and nonmembers of the MCCFA participated in electing committee members.

The core issue is whether the rationale for the agency shop in traditional collective bargaining applies with the same force to the meet and confer process in higher education. We think it does not.

A fundamental element of the agency shop rationale is that, absent collective representation, the employees as a whole could not effectively participate in decisions that are the subject of representation. This, indeed, is a key factor in making union security a legitimate interest of the state. In higher education, however, faculty members have long enjoyed substantial formal and informal participation in college governance—present here in the form of faculty senates prior to PELRA. Such a tradition of shared decisionmaking has not been generally true in other areas of employment or even at other levels of public education. In these other contexts, the state may properly seek to balance labor relations by providing the strongest possible role for a union, but the same state interest is simply not as strong in higher education. If college administrators excluded faculty from matters of governance, there would be a more compelling justification for exclusive union control of faculty governance selection.

Another crucial factor involves the largely economic, tangible nature of traditional collective bargaining. Joining a union cannot constitutionally be made a condition of employment and it is thought that because the tangible benefits of bargaining flow to both members and nonmembers alike, no coercion

to join will result in practice. The subjects of meet and confer, however, are generally intangible issues of governance, such as curriculum proposals and academic standards. It simply cannot be said that the benefits of conferring on such issues flow equally to persons who are excluded from conferring. Indeed, the record shows that at least one faculty member joined the MCCFA because he considered participation in the meet and confer process essential to his particular position. Several others also testified that they considered such participation to be an essential part of serving on the faculty. This is precisely the kind of impermissible "joining as a condition of employment" which results from the unique character and tradition of governance in higher education. It does not result, however, from exclusive representation on matters within the traditional scope of collective bargaining because the tangible fruits of such bargaining flow to all employees regardless of whether they are members of the labor organization.

A third factor involves the union's legitimate need for security, which is generally promoted by excluding rival unions from representing segments of the same bargaining unit and by requiring nonmembers of the union to pay their fair share of the costs of collective bargaining, contract administration and grievance processing. Union security will not be jeopardized by allowing nonmembers of the MCCFA to participate in selection of meet and confer representatives. The MCCFA remains the exclusive representative for all matters subject to the mandatory bargaining provisions. No rival unions could simultaneously represent community college faculty. The MCCFA continues to have sole control over mandatory bargaining, contract administration and grievances. It continues to collect fair share fees from nonmembers

to defray the costs of such efforts. No one therefore gets a free ride on the important efforts expended in these areas.

Another factor in the agency shop rationale is that, absent such a system, the employer would be subject to irreconcilable conflicting demands from rival unions. Much of this concern arises because the employer is under a mandatory duty to bargain. Here, however, the mandatory bargaining process remains under the sole control of the MCCFA. In no event would the employer be forced to bargain with more than one group.

The subject matter of meet and confer committees and the scope of mandatory bargaining are mutually exclusive. Of course, it is difficult to draw a line between the two jurisdictions, but this is inevitable unless all issues are subject to just one process or the other. This line drawing has already reached the Minnesota Supreme Court three times since PELRA was enacted. *See General Drivers Union Local 346 v. Ind. Sch. Dist. No. 704*, 283 N.W.2d 524 (Minn. 1979); *Mpls. Fed. of Teachers v. Mpls. Special Sch. Dist. No. 2*, 258 N.W.2d 802 (Minn. 1977); *Int'l Union of Operating Engineers v. City of Mpls.*, 233 N.W.2d 748 (Minn. 1975). Although there may be an added dimension to the line drawing if the meet and confer committees are open to nonmembers of the MCCFA, the line drawing itself is essentially unchanged. The question remains one that frequently arises in labor law—whether a particular issue is subject to mandatory bargaining.

We thus conclude that the rationale which properly supports the agency shop generally does not justify the MCCFA's sole authority to select meet and confer representatives in the community colleges.

The MCCFA contends that the present practice is not different in any material way from the faculty senate system which preceded PELRA. The argument is that majority selec-

tion of a labor organization is the equivalent of majority selection of a faculty senate. Despite its superficial appeal, this contention glosses over constitutional differences between the two systems. The plain fact is that all faculty members formerly had the right to vote for individual representatives that would deal with issues of college and faculty governance. All faculty members could also seek to serve in such roles. These rights are now completely lost unless one joins the MCCFA. The right to even speak out on such issues is further impaired by the knowledge that one could be excluded from serving in the process if the MCCFA should desire to retaliate for protected speech activity. The former faculty senate system did not impair these First Amendment interests, interests which are paramount in the context of higher education.

We hold that the First Amendment interests of faculty members are infringed if the labor organization has sole authority to select meet and confer representatives and that such infringement, in the context of higher education, is not supported by overriding state interests.[21] The contract provision establishing such exclusive selection is therefore void and section 179.66, subd. 7, of PELRA is declared unconstitutional insofar as it requires or allows such a practice in the meet and confer context.

In so holding, we do not suggest that a labor organization cannot play a major role in the meet and confer process. To the contrary, the state has an obvious interest in harmonizing the meet and negotiate process with the meet and confer process. Moreover, the MCCFA, as the representative of a majority of the faculty, has a legitimate claim to a significant role in the meet and confer process. If, for example, the pres-

[21] Nothing in our holding should be viewed as if it also applies outside the context of higher education.

ent structure were operated under the auspices of the MCCFA, but committee memberships were open to and elected by all faculty, including nonmembers of the MCCFA, legitimate state interests could be served without the constitutional impairments of the present system.

We again emphasize the narrowness of our holding. We are not confronted with a faculty union's role in ad hoc governance mechanisms which might arise from time to time. The need for administrative expedience and potential for impairment of associational rights might well lead to a different result. We will not speculate, however, on the constitutionality of governance mechanisms that are not before us.

III

SUMMARY

1. The Minnesota Community College Faculty Association (MCCFA) may act as an exclusive representative pursuant to PELRA, Minn. Stat. § 179.61 *et seq.*

(a) The provisions of PELRA that allow for an exclusive representation system of collective bargaining and that impose duties to "meet and negotiate" with respect to compensation and other terms and conditions of employment are constitutionally valid on their face and as applied in the community colleges;

(b) No constitutional violation arises from the MCCFA's status as a private organization. PELRA, on its face and as applied, does not impermissibly delegate sovereign state power nor impermissibly confer any power to make "economic laws;"

(c) No constitutional violation arises from the MCCFA engaging in limited political activity which relates directly to its collective bargaining efforts. MCCFA's function as an exclusive representative under PELRA does not result in any compelled association with a quasi-political party. The

MCCFA and the organizations with which it is affiliated (The Minnesota Education Association and National Education Association) do not together constitute a single integrated organization nor are they, alone or in conjunction, a quasi-political party.

2. The present practice of having the MCCFA select all representatives on meet and confer committees is unconstitutional. Such practice has an inherent chilling effect on the associational and speech interests of nonmembers of the MCCFA and, unlike exclusive control over the "meet and negotiate" process, is not supported by compelling state interests.

(a) The meet and confer provisions of PELRA are valid insofar as they impose upon employers the duty to meet and confer and provide employees the right to meet and confer. Nothing in the Constitution requires that the state abandon what appears to be essential in college administration—involving the faculty in college governance;

(b) The provisions requiring employees to select meet and confer representatives, Minn. Stat. § 179.73, subd. 2, as applied to the community colleges, effectively requires and has resulted in the establishment of a formal governance system which is the primary mechanism for expressing faculty views on all issues outside the mandatory bargaining process. This provision is valid as applied to community colleges only if all faculty members have a fair opportunity both to select and serve as governance representatives.

(c) The clause of the collective bargaining contract which gives the MCCFA sole authority to select meet and confer representatives is void, and the statutory provision which requires the employer to meet and confer only through such organization is invalid insofar as it allows or requires the present practice. *See* Minn. Stat. § 179.66, subd. 7.

(d) The foregoing would not preclude conducting the meet and confer process under the auspices of the MCCFA, so long as both members and nonmembers have a fair opportunity to select and serve on the meet and confer committees.

ORDER FOR JUDGMENT

The constitutional infringements caused by the present meet and confer process in the community colleges clearly occur under color of state law. The Minnesota State Board for Community Colleges, in its official capacity, and the Minnesota Community College Faculty Association must equally share liability inasmuch as they together negotiated the aspects of the present structure which we have found violate plaintiffs' constitutional rights. There is no basis for individual liability or for finding any defendants liable other than the MSBCC and the MCCFA.

The parties have stipulated to nominal money damages of one dollar and we find that no other money damages are appropriate. The plaintiffs are entitled to declaratory and injunctive relief in accordance with this opinion. Therefore, PELRA as applied to the community colleges is declared valid in all respects, except

(1) Minn. Stat. § 179.73, subd. 2, is declared valid so long as all community college faculty members are provided a fair opportunity both to select and serve as meet and confer representatives;

(2) Minn. Stat. § 179.66, subd. 7, is declared unconstitutional only insofar as it allows or requires an exclusive representative in the community colleges to have sole authority to select meet and confer representatives;

(3) The clause of the collective bargaining contract conferring sole selection authority upon the MCCFA is declared invalid, and the MCCFA is enjoined from making any further

selections of meet and confer representatives pursuant to such clause.

The defendants shall bear their own costs in this proceeding and 20% of plaintiffs' costs shall be taxed to the MSBCC and the MCCFA, to be borne in equal shares.

Judgment shall be entered in accordance with this order.

GERALD W. HEANEY
United States Circuit Judge

DONALD D. ALSOP
United States District Judge

LARSON, Senior District Judge, concurring and dissenting.

I am in substantial agreement with the Memorandum Opinion and Order but dissent as to paragraphs (1), (2), and (3) in the Order for Judgment.

EARL R. LARSON
U.S. Senior District Judge

Dated: March 30, 1982.

(Caption)

FINDINGS OF FACT AND ORDER

Pursuant to the Order of this Court dated December 13, 1979, the parties have presented extensive evidence before Special Master Leonard E. Lindquist. Proceedings before the Special Master involved 41 hearing days, 6,000 pages of transcript, the introduction of over 500 exhibits and the filing by each party of various briefs and elaborate proposed findings of fact. The Special Master filed his recommended findings of fact with this Court on March 13, 1981.

The following constitutional issues remain for this Court to determine:

(1) Whether it is constitutional, under the First and Fourteenth Amendments, for the Minnesota Community College

Faculty Association (MCCFA) to act as "exclusive representative" of plaintiffs pursuant to the collective bargaining provisions of the Minnesota Public Employment Labor Relations Act (PELRA), Minn. Stat. § 179.61 *et seq.*; and

(2) Whether the "meet and confer" provisions of PELRA, Minn. Stat. §§ 179.63, subd. 15, 179.65, subd. 1, and 179.66, subd. 3, 7, are constitutional on their face and as applied to plaintiffs under the First and Fourteenth Amendments.

Before adopting findings of fact, we carefully reviewed the trial record, the stipulations of fact, the parties' proposed findings of fact and the briefs in support thereof. The findings herein represent our independent judgment based upon that review.

In making these findings, we have allocated the burden of proof as follows: plaintiffs must establish that exercise of a specific constitutional right is impaired by the challenged statute or practice and that such a right is deemed a fundamental one. If plaintiffs meet this burden, the defendants must then demonstrate that there is a compelling legitimate state interest served by the challenged statute or practice which outweighs the impairment of the protected right, and that no less restrictive means are reasonably available to pursue such compelling interest.[1] *See generally Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Elrod v. Burns*, 427 U.S. 347 (1976).

Based upon the foregoing, the Report of the Special Master is adopted as modified and set forth herein.

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[1] As to plaintiffs' claim that defendant labor organizations are predominantly political in character, we have placed the burden upon the defendants to show that their activities predominantly relate to collective bargaining. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 239 n.40 (1977); *cf.* Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 Minn. L. Rev. 183, 241-249 (1980).

I. PARTIES

1. Plaintiffs are residents of Minnesota, "public employees" under Minnesota law,[2] and are employed by the Minnesota State Board for Community Colleges (MSBCC) as follows:

a. Leon Knight and Morgan Kjer are faculty members of North Hennepin Community College, located in Brooklyn Park, Minnesota;

b. James D. Wallace, Terrence D. Florin, Harold J. Gardner, Eugene D. Mielke, Joan M. Farkas and Ronald Lievense are faculty members of Normandale Community College, located in Bloomington, Minnesota; and

c. Ralph G. Powell and Cresston Gackle are or were faculty members at Anoka-Ramsey Community College, located in Coon Rapids, Minnesota.[3]

2. Plaintiffs are represented collectively in the negotiation of collective bargaining agreements, grievance adjustment, and arbitration issues in dispute with MSBCC by defendant Minnesota Community College Faculty Association (MCCFA) which is certified as their exclusive representative pursuant to PELRA. Minn. Stat. § 179.61 *et seq.*

3. Certain of the plaintiffs are not and do not desire to become formal members or supporters, financial or otherwise,

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[2] *See* Minn. Stat. § 179.63, subd. 7.

[3] The defendant labor organizations assert, and the plaintiffs have not challenged, that the following plaintiffs are no longer employed as community college faculty members: William B. Bauman, Thomas J. Patin, Dr. Richard A. Thompson, Gary Nelson, Lucille Johnson, Virginia Lanegran and Richard Isenhart. In addition, three plaintiffs, Donald A. Dahlin, David R. Grout and Max A. Malmquist, had previously expressed a desire to withdraw their participation in the case, which request was denied together with other matters in this Court's Order dated April 24, 1980. The plaintiffs' proposed findings did not include these three persons as identified plaintiffs.

of defendants[4] MCCFA, Minnesota Education Association (MEA), Independent Minnesota Political Action Committee for Education (IMPACE) or National Education Association (NEA), nor do they desire to be represented either individually or collectively by said organizations with respect to terms and conditions of employment, other personnel or educational policies subject to the "meet and confer" provisions of PELRA, or any other matter in which defendant labor organizations are involved.

4. Defendant labor organizations are the MCCFA, MEA, NEA and IMPACE, the structures of which are described *infra* at pp. 4-7.

5. Defendant state officials are as follows:

a. The Minnesota State Board for Community Colleges (MSBCC) is an agency of the State of Minnesota, a "public employer" under PELRA, and is responsible for managing the public community colleges of Minnesota, including those which employ plaintiffs;

b. Phillip C. Helland is the chancellor of the community college system and is the chief executive officer of the MSBCC;

c. Dale A Lorenz is the president of Normandale Community College, John Helling is the president of North Hennepin Community College;

d. The Minnesota State Treasurer and Commissioner of Finance are involved in the implementation of PELRA for purposes of this action only to the extent that their duties include withholding "fair share fees" from employees' wages and transmitting such fees to the exclusive representative; and

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[4] The following plaintiffs are presently members of the MCCFA: Harold J. Gardner, Eugene D. Mielke, Joan M. Farkas and Crosston Gackle. Ralph G. Powell has become a faculty member at Minneapolis Community College and thereafter joined the MCCFA.

e. The director of the Bureau of Mediation Services' only involvement in this action was his certification of the MCCFA as the exclusive representative of the bargaining unit in 1971 and his subsequent refusal to change that certification in 1974.

II. STRUCTURE AND ACTIVITIES OF DEFENDANT LABOR ORGANIZATIONS

A. Structure

1. *NEA.* NEA is a national voluntary organization of teachers, governed by its Representative Assembly, Board of Directors and Executive Committee, that has both state and local affiliates. Through reciprocal membership requirements as a condition of affiliation, members of a local or state affiliate must become members of the NEA and of both the state and local affiliates.

The principal policymaking body of the NEA is its Representative Assembly, comprised of members of the national, state and local associations. NEA's program budget, constitution, bylaws and standing rules, and resolutions with respect to issues and goals are all voted upon by the Representative Assembly. It also elects the president, vice president, secretary, treasurer, at-large members of the Board of Directors, and the at-large members of the Executive Committee.

Only the NEA may amend its constitution and bylaws, which are separate from those of MEA or MCCFA. The NEA is the exclusive employer of its professional staff and such staff are not subject to supervision by any staff of MEA or MCCFA. No state or local affiliate has any authority over any collective bargaining agreement entered into by the NEA with its professional staff. NEA sets its own budget and no affiliate has authority to interfere with such determinations.

2. *MEA*. The MEA is a statewide voluntary organization of teachers that operates under the direction of its own Representative Assembly, Board of Directors and Executive Committee, all of which are separate from the representative or delegate assemblies, boards and committees of the NEA and MCCFA. The MEA has divided the state into various geographic regions and other units known as UniServ units, each of which serves one or more local associations. Every UniServ unit, including the MCCFA, is entitled to representation on the MEA's Board.

MEA has its own constitution and bylaws, which it alone may amend. Such amendment does not require approval by the NEA or any local affiliate.

MEA's staff operate under the direction of MEA's executives and is separate from the staff of NEA and MCCFA, although some MEA staff may be assigned to assist affiliates, including MCCFA.

MEA's boards, committees and assemblies determine its program budget and other expenditure decisions, without any power of review by the NEA or local affiliates.

3. *MCCFA*. The MCCFA is a voluntary organization of community college faculty members operating under the direction of its own Delegate Assembly, Board of Directors and Executive Committee. As an affiliate of the MEA and NEA, MCCFA requires its members to become members of MEA and NEA.

MCCFA's relationship with the NEA and MEA is set forth in the affiliation agreement between these organizations. Under this agreement, MCCFA members pay "unified dues" to the MCCFA, MEA and NEA. The dedication of a portion of such dues to MEA and NEA is in exchange for staff, office and other assistance to MCCFA. Extensive evidence was sub-

mitted with respect to accounting for the budgets and allocations between the organizations. The evidence established that at least 75% of MCCFA member dues are expended by or on direct behalf of MCCFA. The portion allocable to the MCCFA is higher if regular indirect MEA and NEA assistance, or emergency aid such as strike assistance, is included.

The authority of MCCFA to maintain the autonomy specified under its constitution, to conduct its own meetings, to elect its own officers and to adopt its own policies, are also provided for in the affiliation agreement.

MCCFA's constitution and bylaws are separate from those of MEA and NEA. MCCFA's by-laws may be amended only by its membership. MCCFA's board of directors, officers and member assemblies are all separate from those of MEA and NEA.

MCCFA alone determines the scope, content, subject matter and direction of its collective bargaining with the MSBCC. NEA and MEA have no authority to determine or participate in the determination of such matters by MCCFA.

4. *IMPACE.* IMPACE is a voluntary, nonprofit committee of individual educators which may be characterized as MEA's political action arm. Its Board of Directors are appointed by the MEA Board of Directors. The IMPACE board exercises general supervision and control of its organization, including all determinations of financial contributions to the campaigns of candidates for public office in Minnesota.

Membership in and contributions to IMPACE are wholly voluntary and distinctly separate from membership in or contributions to MEA, NEA or MCCFA.

IMPACE has sole authority over its funding decisions and other activities. IMPACE contracts and pays for the services of certain MEA staff members together with paying MEA

for IMPACE's office space and other support services. IMPACE has no authority to participate in or exercise influence over budget, program, collective bargaining or other regular operations of NEA, MEA or MCCFA.

5. *NEA-PAC.* NEA-PAC is not a defendant. It is a national voluntary, nonprofit committee of teachers which may be characterized as NEA's political action arm. It is governed by its own Steering Committee which determines which campaigns of candidates for federal office shall receive financial contributions. The NEA-PAC Steering Committee and NEA officers and directors are separate entities. IMPACE Chairman, Roger Johnson, is a member of the NEA-PAC Council by virtue of his IMPACE chairmanship.

Membership in or contribution to NEA-PAC is wholly voluntary and distinctly separate from membership in or contribution to NEA, MEA or MCCFA.

NEA-PAC has no authority to participate in or exercise influence over budget, program, collective bargaining or other regular operations of NEA, MEA or MCCFA.

6. *INTERRELATIONSHIPS.* In limited circumstances, NEA, MEA, MCCFA, NEA-PAC and IMPACE provide to or share with one another various services and facilities. Such sharing of services, facilities or staff is generally financed by each separate organization to the extent such organization directly benefits from the particular sharing arrangement. Officials, staff personnel and representatives of NEA, MEA, MCCFA, NEA-PAC and IMPACE regularly attend meetings with one another, plan certain cooperative programs, report to their respective organizations concerning the activities of the other organizations, and maintain continuous channels of communications among themselves. In special cases, the degree of support for an affiliate may be quite substantial (*see* p. 10, *infra*, regarding strike assistance).

MCCFA, MEA and NEA are related by their agreement of affiliation, by having certain common goals and by occasional sharing arrangements. They are not and do not function or operate, however, as a single integrated unit. In making this finding, we have considered the testimony of Professors Schneier and Morgan, presented by plaintiffs, and the record as a whole. Each organization has a separate board of directors, officers, committees, constitution and bylaws. Each organization maintains exclusive control over its budget, program activity and general policy-setting process. Each organization maintains separate and exclusive control over its professional staff and management operations. Each organization maintains separate and exclusive control over its collective bargaining determinations. The record thus shows that MCCFA, MEA and NEA are not a single integrated organization. The record also establishes that IMPACE and NEA-PAC are separate political action committees of MEA and NEA, respectively. Because membership in or contribution to IMPACE and NEA-PAC are wholly voluntary and separate from any participation in MCCFA, MEA or NEA, IMPACE and NEA-PAC are also not part of any single integrated organization.

B. General Activities of Defendant Labor Organizations

1. *MCCFA.* Since 1971, MCCFA has been the certified exclusive bargaining agent for the faculty of Minnesota's community colleges. MCCFA was actively engaged for over a year negotiating the 1973-75 collective bargaining contract with MSBCC. This accord was reached without strike or arbitration. The 1975-77 and 1977-79 contracts were also negotiated by MCCFA for approximately one year each; both resulted in arbitration proceedings and awards; and, in both cases, the Minnesota Legislature failed to fully fund the arbitration

award. MCCFA also negotiated the 1979-81 contract for nearly a year. In this case, a three-week strike resulted from a refusal by MSBCC to arbitrate the dispute.

The subject matter of these negotiations by MCCFA has included teaching loads, work assignments, salaries, leave policies, grievance procedures, seniority rights, fringe benefits, grounds for dismissal and the scope of arbitration.

Roughly one-half of MCCFA's annual budget is expended on the costs of operating its 22-person Board of Directors, its Executive Committee and the salary of its president. The president chairs meetings of the Board and Executive Committee, which take place at least monthly; appoints members and serves as an ex officio member of standing committees (Negotiations Committee, Meet and Confer Committee, Legislative Committee, Professional Growth Committee, Resolutions Committee and others); chairs the negotiation teams and serves generally as the chief spokesperson of MCCFA.

The MCCFA Executive Director is salaried by the MEA, pursuant to the affiliation agreement, but is primarily involved in grievance of MCCFA claims, MCCFA contract interpretation and negotiations and other MCCFA matters.

Roughly one-fifth of the MCCFA budget is expended on its committee activities in such areas as negotiations, meet and confer, legislative matters and professional growth.

The testimony and exhibits relating to MCCFA activities clearly establish that nearly all such activities relate directly to collective bargaining, formulation of a bargaining position, contract administration or closely related organizational and professional growth.

2. *MEA*. MCCFA is affiliated with MEA, a statewide organization of local teacher affiliates that represent more than half of the public school teachers in Minnesota.

MEA assists its affiliates in virtually all areas in which they are active. MEA has departments (paid staff of MEA) and councils (volunteer teacher members who receive only expenses) in the following areas, on which well over half of the MEA budget is expended: Negotiations, Teacher Rights, Field Services (including UniServ), Instructional and Professional Development, Communications, Economic Services, and Governmental Relations. The activities of these departments and councils include training of teachers in grievance procedures, legal defense or promotion of teacher rights, research and consultation on the broad range of subjects treated in negotiations, consultation on arbitration matters, investigation of unfair labor practice charges, direct field staff assistance to local affiliates in all of the foregoing areas, researching and organizing teacher education programs dealing with classroom skills and other professional development, and assembling insurance, travel and other group benefits. Roughly one-third of MEA's budget is expended on administration, governance and physical facilities, including offices, equipment, officer salaries and costs of Board meetings and Representative Assemblies.

The testimony and exhibits relating to MEA activities clearly establish that all but an insignificant portion of such activities relate directly to collective bargaining issues such as teacher salaries, fringe benefits, size of classes, job security and other aspects of teacher welfare.

The MEA directly assisted the MCCFA during the latter organization's 1979 strike action. MEA granted MCCFA $200,000 to maintain strike facilities, paid $100 per week to striking faculty members after the tenth day of the strike, and, together with NEA, guaranteed approximately $300,000 in loans to the strikers. This strike aid alone exceeded three years of MCCFA dues to MEA.

3. *NEA*. The NEA is a national teacher organization which engages in a variety of activities aimed at promoting public education, teacher welfare and improving the bargaining ability and position of its members and affiliates.

The overwhelming majority of NEA's budget expenditures relate to training teachers in grievance procedures, professional growth and skill development of teachers, technical management and other organizational assistance to its affiliates, extensive research support relating to collective bargaining issues, and direct assistance to affiliates engaged in collective bargaining.

C. Political Activity of Defendant Labor Organizations

1. NEA-PAC and IMPACE are political action arms of NEA and MEA, respectively. NEA-PAC makes contributions to the campaigns of federal candidates, and IMPACE makes contributions to state and local candidates. The funds for such contributions are independent of dues-money and are raised through separate voluntary contributions, primarily from teachers.

2. There is some overlap of NEA-PAC activity with regular NEA organizational activity and staff, and some NEA political activity that may be only incidentally related to collective bargaining. The NEA has a rebate procedure which refunds, to each member who desires, the portion of regular dues expended on political activity which does not bear directly on collective bargaining, grievance procedures and teacher welfare. Rebated costs include those related to any overlap with NEA-PAC, the preparation or dissemination of candidate ratings or any other indication of candidate preference, certain ideological or charitable activity, and other lobbying not related directly to collective bargaining or terms and conditions of employment. The rebatable amounts, as determined by

NEA, have always aggregated to less than 10% of NEA dues. There was no evidence introduced showing that NEA expended more than the rebatable amounts on political activity unrelated to collective bargaining matters.

Separate from NEA-PAC and rebatable activity, NEA does engage in political activity at the federal level that the record shows relates directly to collective bargaining, education funding and other issues that are integral to teacher welfare.

3. There is some overlap between IMPACE activity and the regular MEA organizational activity and staff. For example, local government relations councils participate in screening local candidates, as does IMPACE. In addition, some MEA staff members participated in political activity on behalf of the 1976 Carter-Mondale campaign, but the evidence showed that such partisan activities, taken as a whole, would be less than 2% of MEA's total budgeted activities.

Separate from any IMPACE overlap, MEA regularly engages in political activity at the state and local levels in the areas of education funding, teacher tenure rights, class-size policy, retirement benefits and other teacher welfare concerns affected by state or local budget decisions. Through its government relations committee and department and through a coordinated program of local volunteer members, MEA organizes lobbying efforts directly related to the foregoing teacher concerns. The record establishes that such political activities relate closely and directly to the collective bargaining efforts of MEA.

4. MCCFA has engaged in political activity that the record shows relates chiefly to securing legislative approval of the employment contracts negotiated or arbitrated with the MSBCC and to other collective bargaining issues.

5. Taken as a whole, the record establishes that MEA and NEA are properly characterized as public employee organizations actively engaged in improving through collective bargaining the terms and conditions of employment for teachers, and that MCCFA is organized and affiliated with MEA and NEA to pursue similar efforts on behalf of the community college faculty it represents. All three organizations engage in a wide range of legislative, governmental and public relations activities that are closely and directly related to furtherance of each organization's collective bargaining activities. IMPACE and NEA-PAC are separate from the regular operations of MCCFA, MEA and NEA and engage in partisan political activity financed by the independent, voluntary contributions of individual teachers and others.

This finding is based on the testimony of numerous officers and staff of MCCFA, MEA and NEA concerning the character of their political activity and the proportion of their time spent on political activity of any kind, in addition to the many exhibits relating to budget allocations of each organization.

There were two types of affirmative evidence presented by the plaintiffs to show that the defendant organizations are predominantly political action organizations: (1) written or oral statements made by the defendant organizations to the effect that political action is an integral, essential element of their activities; and (2) a "content analysis" of selected publications and meeting minutes of various defendant organizations, from which it was inferred that 50-100% of each organization's activity is "political" as opposed to "collective bargaining." We find this affirmative evidence unpersuasive. It fails to distinguish between activity related to collective bargaining and political activity unrelated to that end. The content analysis in particular treats all "lobbying, organizing and litigation"

matters as separate from "collective bargaining." Lobbying, organizing and litigation activities that directly relate to collective bargaining issues are thus excluded from the "collective bargaining" category of the analysis. The content analysis also assumes that the publications analyzed accurately reflect the range of activities actually undertaken by the organizations, an assumption unsupported by the record as a whole. The analysis of organizational publications was also outweighed by the firsthand testimony of the officers and staff of such organizations and the budgetary and other records of their activity.

III. FACULTY-EMPLOYER RELATIONS

A. The Structure of PELRA

Pursuant to Minn. Stat. § 179.67, the MCCFA has been certified as the exclusive representative of community college faculty for purposes of collective bargaining and has negotiated four such employment contracts since 1971.

PELRA imposes upon the employer a duty to "meet and negotiate" with an exclusive representative with respect to "terms and conditions of employment," as defined in the Act, and imposes a duty to "meet and confer" with "professional employees" with respect to employee concerns that fall outside the definition of "terms and conditions." *See* Minn. Stat. §§ 179.66, subds. 2 & 3, and 179.63, subds. 15, 16 & 18. PELRA further provides that, when an exclusive representative has been certified, "[t]he employer shall not meet and negotiate or meet and confer with any employee or group of employees * * * except through the exclusive representative." Minn. Stat. § 179.66.

Public employees under PELRA have a right not to join any labor organization which may be certified as their exclusive representative, but a "fair share fee" may be deducted from

nonmembers and paid to the representative. Minn. Stat. § 179.65, subd. 2.

Public employees have the right to communicate with their employer with respect to terms and conditions of employment so long as such activity "does not circumvent the rights of the exclusive representative if there be one." Minn. Stat. § 179.65, subd. 1.

Professional public employees, such as plaintiffs, have the right to "meet and confer" with the employer regarding matters other than "terms and conditions" of employment. Minn. Stat. § 179.65, subd. 3.

B. The Effects of PELRA in Practice

1. The 1979-81 employment contract between MCCFA and MSBCC provides *inter alia* that:

a. "The Employer will not interfere with the rights of employees to become or not to become members of [MCCFA] and there shall be no discrimination or interference, restraint, or coercion by the Employer * * * against any employee because of [MCCFA] membership or non-membership[;]"

b. The MCCFA has the sole right to "establish" up to six faculty committees at each campus for the purpose of holding "exchange of views" meetings with the college administration in the areas of "Personnel, Student Affairs, Curriculum, Facilities, Fiscal Matters, and General Matters;" and "[e]ach committee will have full authority in the assigned area to present the views of the employees" in such meetings;

c. Alternative structures for exchanging views may be agreed to by the campus chapter of MCCFA but "such agreement shall not in any way regulate or control the right of selection or participation by the local [MCCFA] association;"

d. A statewide-level "meet and confer" committee shall also be established by the statewide MCCFA, shall meet with

the MSBCC at least three times per year, and shall include as subjects "all items submitted by the State [MCCFA];"

e. Statewide and campus faculty representatives for contract administration matters are designated by the statewide or local MCCFA;

f. Class-size issues shall be resolved "through the exchange of views process;"

g. The academic year and summer school calendar shall be established by a committee comprised of the college president, student body president and campus MCCFA president;

h. The designation of academic departments and the responsibilities of "department coordinators" shall be determined through the exchange of views process;

i. Employee "complaints" may be presented to administrators with or without participation of the MCCFA grievance representative; formal grievances must be signed by the affected employee and the MCCFA grievance representative; and

j. The employer "will not during the life of this contract meet and negotiate or meet and confer relative to terms and conditions of employment with any employee or group of employees * * * except through the exclusive bargaining representative."

2. Prior to the implementation of PELRA, the faculty of at least some community college campuses were organized in "faculty senates or councils," with various committees thereof focusing on such subject areas as new course proposals and other curriculum matters, degree requirements, student activity budgets, academic standards and related discipline procedures for students, teacher evaluation and general budget and planning issues at each such campus.

The faculty senates or councils and committees thereof, together with general faculty assemblies, were the primary formal mechanism for formulating faculty views and communicating such views to the administration. Faculty representatives in this formal system were selected by election processes in which every faculty member was eligible to vote and seek election.

3. Since PELRA was adopted, "meet and confer" and "exchange of views" committees (hereafter, meet and confer) have replaced faculty senates and councils and are the principal formal mechanisms, at the campus and statewide levels, for formulating faculty positions on their concerns. The subjects covered by the meet and confer system include new course proposals and other curriculum matters, budgetary planning, development of facilities, student rights and student affairs generally, evaluation of administrators, selection of college presidents, academic accreditation of the community colleges, and other matters.

4. The degree and effectiveness of faculty organization varied from campus to campus prior to PELRA. The duty to "meet and confer," however, requires administrators at each campus to listen to and consult with the faculty on policy questions other than "terms and conditions of employment." Together with the establishment of "meet and confer" committees, the duty imposed by PELRA has made the formal meet and confer process the primary mechanism for any significant faculty-administration communication on such policy questions.

5. The views of a faculty meet and confer committee are considered by administrators to be the official faculty position on matters discussed in meet and confer sessions, but the administrators recognize that there are other positions held by individual faculty members.

6. No community college administrator or MSBCC member plays any role in the selection of the members on the faculty's meet and confer committees.

7. Pursuant to the employment contract, the MCCFA has exclusive control over designation of all faculty members on meet and confer committees at the campus and statewide level. Although there is no express policy against including nonmembers of MCCFA on such committees, in practice nonmembers have not been designated to serve in such roles.

8. Regardless of membership or nonmembership in MCCFA, all faculty have the right to informally communicate their individual views to administrators and the MSBCC and MCCFA have never attempted to deny or abridge such rights. The exclusive formal process for formulating and communicating a collective faculty position on policy questions, however, is through the meet and confer committees.

9. There are few formal rules with respect to determining which faculty members may appear before or present proposals to the meet and confer committees. In practice, however, committee members determine the agenda and focus of faculty expressions and committee meetings are not a general forum for individual faculty members or others to discuss matters of interest to them.

IV. FIRST AMENDMENT AND STATE INTERESTS

A. Associational Interests

1. The decision to join or contribute to IMPACE or NEA-PAC is wholly an individual, voluntary one. This record is devoid of any evidence that the plaintiffs have been required or in any manner coerced into supporting, joining, or refraining from opposing the efforts of IMPACE or NEA-PAC.

2. The only statutorily-imposed relationship between plaintiffs and MCCFA, MEA and NEA involves the deduction

of a fair share fee from the plaintiffs that is paid to MCCFA as the exclusive bargaining representative of community college faculty, a portion of which is paid to MEA and NEA for various collective bargaining and related assistance the latter groups provide to MCCFA.

3. To obtain or retain their faculty positions, or to derive the economic, job security and other benefits under the "terms and conditions" (as defined by PELRA) of their employment, the plaintiffs have not been and are not required or coerced into joining, or refraining from opposing, MCCFA, MEA or NEA. Such rights and benefits flow equally to all faculty members regardless of their membership or nonmembership in MCCFA.

4. The ability of the plaintiffs to participate in the meet and confer process, and to serve on meet and confer committees, is impaired by nonmembership in MCCFA as follows: The employment contract provides MCCFA with exclusive control over the selection of faculty members on meet and confer committees; such committee members have principal control over formulating the agenda of faculty concerns and the adoption of faculty views; and nonmembers of MCCFA have not been, in practice, selected for participation on such committees.

5. Having the opportunity to fully participate in the meet and confer process is viewed by some plaintiffs as essential to their role on the faculty. Some plaintiffs felt pressure to join the MCCFA in order to have such an opportunity and at least one plaintiff joined MCCFA for this reason.

6. No evidence was introduced demonstrating that service on meet and confer committees was available equally to members and nonmembers of MCCFA.

B. Free Speech Interests

1. The right of all faculty, both members and nonmembers of MCCFA, to communicate informally and individually with administrative officials has not been impaired by the MCCFA, MEA, NEA or the MSBCC.

2. Certain rights that might be characterized as elements of academic freedom are expressly protected by the employment contract, *e.g.*, the right of faculty members to select their course materials and textbooks, to choose their methods of teaching, to research and publish their work, to evaluate student performance and to select library materials.

3. There is a potential for impairing free speech rights arising from MCCFA's exclusive control over selection of faculty members on the meet and confer committees, as follows: A faculty member could be inhibited from speaking out against MCCFA generally or against particular issue positions strongly held by MCCFA because it might be feared that such action could result in exclusion from serving on the meet and confer committees.

The plaintiffs have not demonstrated that MCCFA selections of meet and confer committee members have in any way been conducted to "retaliate" in such a manner, nor that any faculty member's exercise of free speech has been impaired in practice by virtue of this potential inhibition.

4. The plaintiffs have failed to demonstrate any direct, indirect, actual or potential impairment of their associational and free speech rights, except as indicated in Findings IV(A)(4-5) and (B)(3).

C. State Interests

1. The parties have stipulated to a number of state interests that independent review of the record establish as true and relevant to these proceedings:

a. The State of Minnesota has a legitimate interest in promoting orderly and constructive relationships between public employers and employees. Unresolved disputes between public employers and their employees are detrimental to the public interest as well as to the interests of the involved parties.

b. The State of Minnesota has determined that enactment of the Public Employment Labor Relations Act is the means by which it can best deal with its employees in a fair, efficient and peaceful fashion.

c. A statutory system which permits employees in a unit to be represented by an exclusive representative results in the avoidance of confusion, conflicting demands, and dissension that would result from more than one representative claiming to represent all the employees in an employee unit.

d. The State of Minnesota has a legitimate interest in maintaining "labor peace" by entering into agreements with an exclusive representative for each employee unit, which agreements are not subject to direct challenge by rival employee organizations claiming to represent the same employees in each unit.

2. Creating a procedure for systematic expression of faculty views on a broad range of campus policy questions furthers each of the foregoing state interests.

3. The record does not demonstrate, nor does the State of Minnesota assert, any state interest in allocating the benefits and obligations of the exclusive representation collective bargaining system in a manner which discriminates between members and nonmembers of the employee organization.

4. Additional state interests appear on the face of and by inference from the PELRA statute, which therefore need not be set forth here.

ORDER

1. Each party to this proceeding shall submit proposed conclusions of law based upon the facts as found herein on or before December 9, 1981.

2. Each party may submit a memorandum of points and authorities in support of their position, together with their proposed conclusions. Such memorandum shall not exceed twenty-five (25) pages in length.

3. Final oral argument will be December 16, 1981 at 2:30 o'clock p.m.

GERALD W. HEANEY
United States Circuit Judge
DONALD D. ALSOP
United States District Judge
EARL R. LARSON
U.S. Senior District Judge

Dated: November 16, 1981.

(Caption)

REPORT OF LEONARD E. LINDQUIST, SPECIAL MASTER
Order of Reference to Special Master
December 13, 1979
Report filed March 23, 1981

(Caption)

REPORT OF SPECIAL MASTER
FINDINGS OF FACT

Dr. Edwin Vieira, Jr., Esquire, 12408 Greenhill Drive, Silver Spring, Maryland 20904, and John J. Fogarty, National Right to Work Legal Defense Foundation, Inc., 8001 Braddock

Road, Suite 600, Springfield, Virginia 22160, appeared for and on behalf of the Plaintiffs.

Darel F. Swenson, Esquire, 15500 Wayzata Boulevard, 610 Twelve Oaks Circle, Wayzata, Minnesota 55391, appeared for and on behalf of the Plaintiffs.

Messrs. Eric R. Miller, Keith E. Goodwin, Mark D. Anderson and Donald W. Selzer, Jr., Esquires, of the law firm of Oppenheimer, Wolff, Foster, Shepard and Donnelly, W-1700 First National Bank Building, St. Paul, Minnesota 55101, appeared for and on behalf of the Defendant Labor Organizations

Donald J. Mueting, Esquire, Special Assistant Attorney General, Barbara Lindsey Sims, Special Assistant Attorney General, 515 Transportation Building, St. Paul, Minnesota 55155, appeared for and on behalf of the State Defendants.

On December 13, 1979, the Honorable Donald D. Alsop, the Honorable Gerald W. Heaney, and the Honorable Earl R. Larson, sitting as three-judge panel, issued an order appointing a Special Master in this case pursuant to Rule 53 of the Federal Rules of Civil Procedure. In the order of appointment of December 13, 1979, the Court granted the Special Master the following powers:

1. Conduct conferences, issue orders, and do all other things necessary to supervise compliance with the Order of this Court of December 13, 1979, permitting such changes in the deadlines set by that Order as may be necessary in the interests of justice.

2. Take testimony on disputed facts in the above-entitled action and organize them in an understandable fashion, but not make recommendations to the Court as to an appropriate decision on the merits.

3. Report to the Court on the progress of the parties' compliance with the Order of this Court of December 13, 1979, and upon the timing and procedure adopted for the taking of testimony.

The Court, subsequent to the Order of December 13, 1979, has not restricted the powers of the Special Master concerning rulings on admissibility of evidence or otherwise. The Special Master began hearings in this proceedings on August 4, 1980. The case proved to be a formidable one. There were 41 actual hearing days for the taking of testimony, and the trial transcript consists of 5,693 pages. More than 500 exhibits were introduced, many of which were multiple page documents containing up to several hundred pages.

Elaborate proposed findings of fact were submitted by each party pursuant to an Order of the Special Master dated November 25, 1980. The Special Master makes the following Report pursuant to Rule 53 of the Federal Rules of Civil Procedure and the Order of the Court dated December 13, 1979:

STATEMENT OF ISSUES

The following constitutional issues remain in this action for determination by the Three-Judge Court:

(1) Whether it is constitutional, under the First and Fourteenth Amendments, for the Minnesota Community College Faculty Association to act as "exclusive representative" of plaintiffs under color of the Minnesota Public Employment Labor Relations Act, Minn. Stat. §179.61 *et seq.*

(2) Whether the "meet and confer" provisions of the Minnesota Public Employment Labor Relations Act, particularly Minn. Stat. §§179.63, subdv. 15, 179.65, subdv. 1, and 179.66, subdv. 7, are constitutional on their face and as applied to plaintiffs, under the First and Fourteenth Amendments.

Plaintiffs also have asserted certain federal statutory claims against the several defendants; however, in "Plaintiff's Report to the Court on the Status of the Case as of the Pre-Trial Hearing on 19 November 1979," plaintiffs at page 3 state:

> "These not being federal constitutional claims cognizable by a three-judge court, they will receive no further consideration in this Report. However, the Court should be aware that the federal statutory claims rest upon the same ultimate facts as Plaintiffs' constitutional challenge to PELRA as applied."

BURDEN OF PROOF

The parties have submitted briefs concerning the burden of proof in this matter but the Special Master has made no legal determinations on this issue because the Court in its order of reference directed the Special Master to take testimony on disputed facts and organize them in an understandable fashion, "but not make recommendations to the Court as to an appropriate decision on the merits."

I. PARTIES

1. Plaintiffs are residents of Minnesota and are public employees employed as faculty by the Minnesota State Board for Community Colleges (MSBCC) as follows:

(a) Leon Knight and Morgan Kjer are faculty members of North Hennepin Community College, located in Brooklyn Park, Minnesota;

(b) James D. Wallace, Terrence D. Florin, William B. Bauman, Harold J. Gardner, Thomas J. Patin, Eugene D. Mielke, Dr. Richard A. Thompson, Joan M. Farkas, Gary D. Nelson, Ronald Lievense, and Lucille Johnsen are or were faculty members of Normandale Community College, located in Bloomington, Minnesota; and

(c) Virginia E. Lanegran, Ralph G. Powell, Richard D. Isenhart, and Cresston Gackle are or were faculty members at Anoka-Ramsey Community College, located in Coon Rapids, Minnesota.[1]

2. Plaintiffs are represented collectively in the negotiation of collective bargaining agreements, grievance adjustment, and arbitration of issues in dispute with MSBCC by defendant Minnesota Community College Faculty Association (MCCFA) which is certified as their exclusive representative pursuant to the Public Employment Labor Relations Act (PELRA) M.S. 179.61 et seq.

3. Plaintiffs are not and do not desire to become formal members[2] or supporters, financial or otherwise, of defendants MCCFA, Minnesota Education Association (MEA), Independent Minnesota Political Action Committee for Education (IMPACE) or National Education Association (NEA) or of the National Education Association Political Action Committee (NEA-PAC—which is not a defendant); nor do they desire to be represented either individually or collectively by said organizations with respect to terms and conditions of employment or any other matter in which defendant labor organizations are involved.

4. Defendant labor organizations consist of NEA, MEA, MCCFA and IMPACE.

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[1] Three plaintiffs, Donald A. Dahlin, David R. Grout and Max A. Malmquist had previously expressed a desire to withdraw their participation in the case which request was denied together with other matters in the Court's Order of April 24, 1980. The plaintiffs' proposed findings did not include these three persons as identified plaintiffs.

[2] Defendant Labor Organizations' Response to Plaintiffs' Motion to the Special Master to Adopt their Proposed Findings of Fact at page 2 states: " . . . the following plaintiffs are presently members of the MCCFA: Harold J. Gardner, Eugene D. Mielke, Joan M. Farkas, and Cresston Gackle."

(a) *NEA*. NEA is a national voluntary organization of teachers which is governed by its own Representative Assembly, Board of Directors and Executive Committee. The NEA has both state and local affiliates and the NEA Representative Assembly is comprised of members of the national, state and local associations. NEA's bylaws provide that as a condition of affiliation with NEA, local level affiliates must require their members to become members of NEA and the appropriate state level affiliate where eligible. MEA's bylaws provide that MEA's active members also be members of NEA and of the appropriate local level affiliate of MEA. As an affiliated organization of MEA, MCCFA must make memberships in MEA one of the requirements of membership in MCCFA. MCCFA requires its active members to become members of MEA and NEA.

The Representative Assembly is the primary policy-making body of the NEA. It elects the president, vice president, secretary, treasurer, at-large members of the Board of Directors, and the at-large members of the Executive Committee. The Assembly also adopts the program budget, votes on proposed amendments to the constitution, bylaws and standing rules, receives committee reports, and approves resolutions and new business.

(b) *MEA*. The MEA is a statewide voluntary organization of teachers which is governed by its own Representative Assembly, Board of Directors and Executive Committee. The MEA has divided the state into various geographic regions known as UniServ units. Each UniServ unit serves one or more local associations and usually has its own governance structure. Every UniServ unit and the MCCFA are entitled to representation on the MEA's Board.

(c) *MCCFA.* The MCCFA is a voluntary organization of faculty members which is governed by its own Delegate Assembly, Board of Directors and Executive Committee and is affiliated with the MEA and NEA.

(d) *IMPACE.* IMPACE is a voluntary, non-profit committee of individual educators and others with its own Board of Directors which has general supervision and control of the organization including all determinations of financial contributions to the campaigns of candidates for public office in Minnesota. IMPACE Board of Directors members are appointed by the MEA Board of Directors. Some of defendant labor organizations' officials and publications have characterized IMPACE as MEA's political action arm.

5. *NEA-PAC.* NEA-PAC is not a defendant but is a national voluntary, non-profit committee of teachers which is governed by its own Steering Committee which determines those federal candidates for public office whose campaigns shall receive financial contributions. NEA-PAC has been characterized by some defendant labor organizations' officials as NEA's political action arm. IMPACE chairman, Roger Johnson, is a member of the NEA-PAC Council by virtue of his IMPACE Chairmanship.

II. NATURE OF DEFENDANT LABOR ORGANIZATIONS

1. The MCCFA is the certified exclusive bargaining agent for the faculty of the Minnesota Community College system. It has functioned in this capacity since July 1, 1971. Since that date the MCCFA has been involved in extensive labor negotiations with the MSBCC. Negotiations have encompassed four master contracts. Negotiations for the 1973-1975 contract lasted 18 months, for the 1975-1977 contract, 10 to 12 months, for the 1977-1979 contract, 12 months, and for the 1979-1981

contract, 12 months. As part of the negotiation process, the 1975-1977 and 1977-1979 contracts were submitted to an arbitrator for mandatory arbitration. The 1979-1981 contract was not so submitted because of the MSBCC's refusal to submit the matter to arbitration. As a consequence, a three-week strike occurred. During that strike the MCCFA operated 19 strike headquarters located at the various community college campuses.

2. The negotiations, arbitrations and 1979 strike have resulted in four collective bargaining agreements between the MCCFA and the MSBCC. The agreements cover standard subjects of bargaining between unions and employers such as seniority, salary, fringe benefits, work load, dismissal provisions, a grievance procedure, and leave policies.

3. The MCCFA's primary policy making body is the Delegate Assembly. Between Delegate Assemblies, the Board of Directors, the Executive Committee, the President and the Executive Director conduct the day to day business of the MCCFA. This involves grievance adjustment, contract maintenance, membership promotion, communication, and dealing with MCCFA committees, i.e., negotiations, professional growth, MCCFA resolutions, nominating committee for MCCFA state office, state meet and confer committee and governmental relations committee. These activities are designed to implement its collective bargaining position.

4. The ability of the MCCFA to implement its bargaining position is improved and enhanced to the extent it can obtain support from its members, generate public support for its positions, credibly negotiate with the employer from a position of strength, obtain financial support from all members of the bargaining unit and obtain a high percentage of employees within the unit as members of the MCCFA.

5. While the MCCFA is the certified bargaining agent for the community college faculty members, the MEA is a statewide teacher organization which assists local associations, including the MCCFA, which are affiliated with it, in negotiating, implementing and maintaining collective bargaining contracts. Approximately 65% of the public school teachers in Minnesota are represented by local education associations affiliated with MEA. The remaining 35% are represented by locals affiliated with Minnesota Federation of Teachers. There is continuous competition between these organizations for exclusive representative status in various units with approximately 10 to 15 bargaining elections occurring each year.

6. MEA's assistance to affiliated locals takes place in a number of areas. MEA has departments and councils which function in the area of negotiations, teacher rights, field services, instruction and professional development (IPD), communications, governmental relations and economic services. In addition there is an overall administration and governance structure. Under the MEA's structure, the councils are comprised of teacher members who are not paid for their services save for reimbursement of expenses. In contrast, the departments are staffed by paid employees of the MEA and comprise the day to day working staff of the organization. A description of the departments and councils follows:

(1) *Negotiations.* The Negotiations Council and Department have the purpose of determining and implementing the negotiation policy of the MEA. The department reviews collective bargaining contracts, analyzes district budgets, conducts negotiation training sessions, drafts model contract language, participates in the NEA bargaining support network and provides assistance in local negotiations and in impasse arbitrations as necessary.

(2) *Teacher Rights.* The Teacher Rights Council and Department have the purpose of establishing and monitoring teacher statutory rights and teacher contracts. The areas within teacher right activities relate to grievance processing training for teachers, contract maintenance, job security under the Tenure Act, teacher licensure, tort liability for teachers, legal protection for teachers, and student handicap and child abuse rules and regulations.

(3) *Field Services.* The Field Services Council and Department have the purpose of assisting the local associations and their leadership. This function is primarily carried out by approximately 35 UniServ directors who are located in various regions of the state and who assist a particular UniServ unit which may be comprised of one or more local associations. For example, the MCCFA is one UniServ unit. The UniServ director functions in all significant respects in the same fashion as a private sector union business agent. UniServ directors spend the vast majority of their time assisting locals in bargaining representation elections, collective bargaining, contract administration grievance adjustment and member leadership training.

(4) *Instructional and Professional Development (IPD).* The IPD Council and department have the purpose of improving the professional status of teachers. This includes teacher training programs in such areas as discipline, how to deal with stress and drug abuse and research into class size and issues of academic freedom.

(5) *Communications.* The Communications Council and Department provides for communications both internal and external to the organization. The communication occurs via a number of mediums: written, television and telephone.

(6) *Governmental Relations.* The Governmental Relations Council and Department have the purpose of encouraging MEA members to influence public decision makers on decisions related to education and to become involved in the political process. The Governmental Relations Council has four committees: legislative objectives committee, teacher retirement committee, school finance committee and teacher in politics committee. The Department is staffed by two professionals who are lobbyists registered with the State of Minnesota.

(7) *Economic Services.* The Economic Services Council and supporting separate corporate organization, Economic Services, Inc., provide economic benefits to teachers through group buying, group travel and group insurance.

(8) *Administration.* In addition to the seven councils and departments, the MEA organization has an overall administrative office which is comprised of the office of executive director and the office of business affairs. These offices coordinate the staff functions of the MEA. Further, the elected leadership, the Representative Assembly, the Board of Directors and the officers provide the leadership to the organization and the staff.

7. One particular example of MEA support to the MCCFA related to the three-week 1979 strike. At that time the MCCFA received approximately $200,000 in outright grants from the MEA for the cost of running numerous strike headquarters as well as payments of $100 per week to striking faculty members after the Tenth day of the strike. Further, the MEA, along with the NEA, guaranteed about $300,000 worth of loans to striking members during the period of the strike. The MEA also provided approximately 12 additional MEA staff

members to assist the MCCFA during the strike. That support is emblematic of the need that a particular local may have for the state organization. For example, the financial assistance provided exceeded, in one strike alone, over three years of dues payments by MCCFA to MEA.

8. The NEA is a national organization of teachers which assists locals to become and remain certified as collective bargaining agents and to aid state associations in their role as an advocate for their teacher members. In this effort the NEA has created and funded a bargaining support network system which is a computerized program containing bargaining information, school budget analysis and contract arbitration decisions. This is available to all affiliates. A legal defense fund, the DuShane Fund, is another program which assists state affiliates in providing legal services to teachers concerning job problems. The NEA annually spends significant resources on research and the training of its members and staff concerning negotiations, teacher rights, grievance arbitration, strikes, and governmental relations. For example, the NEA spends millions of dollars to financially support the nationwide UniServ system which functions as paid staff members assisting local associations in the manner of a local business agent.

9. The NEA also annually expends substantial time and money on instruction and professional development for teachers; training and direct assistance to local affiliates concerning bargaining elections and technical information and consulting to local and state affiliates concerning matters such as fiscal procedures, teacher retirement and affirmative action programs. As part of its efforts to improve working conditions for teachers, the NEA lobbies Congress and encourages its members to become involved in supporting educational policies which will improve teacher standards and welfare.

10. Since July 1, 1971, the NEA has provided the MEA and MCCFA with information and assistance in the negotiation of master bargaining agreements and the administration of those agreements, including grievances.

III. POLITICAL ACTIVITIES OF DEFENDANT LABOR ORGANIZATIONS

1. Certain activities conducted by defendant labor organizations can be characterized as political in nature. However, the majority of this political activity is directly related to and reasonably necessary for the proper effectuation of collective bargaining, contract administration, and grievance adjustment.

2. To the extent that defendants are involved in partisan politics, such activity is conducted primarily through their "political action" organizations NEA-PAC, IMPACE and the local association's political action organizations, if any. In addition, the MEA Governmental Relations Council and the MEA Teachers in Politics subcommittee of that council provide a vehicle for participation in political activities by members of the defendant labor organizations.

3. In addition to the MEA Governmental Relations Council, most local associations and UniServ units have local governmental relations councils which work in conjunction with IMPACE to screen candidates for political office. IMPACE provides funds to campaigns of persons seeking public office in Minnesota. NEA-PAC funds presidential and United States congressional and senatorial campaigns.

4. MEA's lobbying activities pertain to those legislative measures which directly affect education and teacher rights issues. Two recent examples of substantial lobbying efforts by the MEA Governmental Relations Department and Council were the potential veto by the Governor of amendments to

PELRA and the recent action by the Governor to reduce state aid to local school districts. Additionally, MEA's lobbying efforts have been directed to such educational issues as teacher retirement benefits, school finance issues, teacher tenure legislation, funding collective bargaining, teacher involvement in curriculum, and teacher licensure by the Department of Education and the Board of Teaching.

5. The NEA and MEA sponsored a "get out the vote" campaign for the 1976 and 1980 Carter/Mondale candidacy to seek election of a candidate with views demonstrably favorable to education; in particular, budgetary allocations.

6. MCCFA directs its lobbying efforts to collective bargaining rights. Lobbying of the state legislature is conducted to obtain approval and funding of MCCFA collective bargaining agreements and for the enactment of legislation concerning community college faculty.

7. NEA has engaged in lobbying activity with the Congress and federal agencies with respect to proposed legislation on significant educational issues such as federal financial support of education, teacher welfare, appropriation for education, education of handicapped children, teacher training, and bilingual education.

8. For those members who do not desire to participate in or support political activities not related to collective bargaining, grievance adjustment and the welfare of teachers, the NEA has adopted a political activity rebate procedure which has been used annually since 1974 to identify the cost of any of its activities directed toward:

(1) The administration of an independent political action committee.

(2) The determination and/or publishing of an organization preference for a candidate for public office.

(3) Efforts to enact, defeat, repeal, or amend legislation which is not related to working conditions (legislation establishing collective bargaining, professional negotiation, or some other system of employer/employee relations is deemed related to working conditions), welfare, or a working environment of employees represented by the MEA and/or its affiliates.

(4) Since 1979, ideological or charitable activities have been included in the political activity rebate calculations.

The amounts of the rebates have been between 6.2 and 8.6 percent of NEA dues.

9. The MCCFA and MEA expend a very limited amount of time and money on political activity which is not related to collective bargaining or teacher rights.

10. Professor Gordon Tulluck of Virginia Poly-Tech Institute testified on behalf of plaintiffs as an expert witness in political science and political economy. Professor Tulluck testified that defendant labor organizations are predominantly involved in partisan politics, lobbying, public relations and political organizing. However, Professor Tulluck made no distinction between the activities which are related to collective bargaining and those which are not. Further, the Tulluck testimony is premised on publication "content analysis." That analysis relies on the assumption that if, for example, 15 percent of the space in an organization's publications deal with a certain issue, then it follows that 15 percent of everything that organization does must necessarily involve the same issue. That assumption is not supported by the evidence.

11. In summary, the MCCFA functions as a public sector union involved in collective bargaining, negotiations, contract maintenance, and grievance adjustment. The MEA and NEA

provide substantial assistance to the MCCFA in this effort. Almost all of the defendant labor organizations' activities, in the last analysis, are related to that effort. To the extent that the defendants, through their union political action committees or otherwise, become involved in partisan political activities, such activities are clearly secondary, in both scope and effort, to the day to day efforts of members and staff to negotiate for and to protect the employment rights of teachers.

IV. FREEDOM OF ASSOCIATION

1. Plaintiffs are not required to become members of any of the defendant labor organizations. The only relationship between plaintiffs and the MCCFA is that the MCCFA is the exclusive representative for the purpose of PELRA and the plaintiffs must pay fair share fees to the MCCFA pursuant to PELRA if the MCCFA so requests.

2. Plaintiffs are not required to agree with MCCFA or give any form of allegiance in order to retain their jobs.

3. Plaintiffs are free to join groups or to refrain from joining groups opposed to the MCCFA and engage in all forms of partisan political activity, lobbying, political organizing and litigation.

4. The only relationship between the plaintiffs and the MEA or the NEA is that a portion of fair share funds go to those organizations to help pay for numerous services available to the MCCFA. Plaintiffs are not required to join the MEA or NEA as a condition of employment. Plaintiffs are not required to give allegiance to the MEA or NEA. Plaintiffs are free to join groups opposed to the MEA or NEA with no adverse impact on their job security. Plaintiffs are free to engage in all forms of partisan political activity.

5. There is no relationship between plaintiffs and IMPACE or NEA-PAC. IMPACE and NEA-PAC are funded

by voluntary teacher contributions obtained in fund-raising drives. Plaintiffs are free to contribute or not to contribute based upon their own personal choice. Plaintiffs are not required to give allegiance to IMPACE or NEA-PAC and may join any organizations opposed to IMPACE or NEA-PAC.

6. The plaintiffs are not required to become members of, to give allegiance to or join in the activities of these organizations. Plaintiffs simply are required to provide financial support for representation in collective bargaining and grievance administration.

V. RELATIONSHIP OF NEA, MEA, MCCFA, NEA-PAC AND IMPACE

1. The defendant labor organizations function independently in negotiating collective bargaining agreements. Specifically, the NEA has no authority to meet and negotiate a collective bargaining agreement with a public employer or to modify or veto any collective bargaining agreement entered into by a state or local affiliate. There is no authority that would permit NEA, MEA, IMPACE or NEA-PAC to determine what the subjects of meet and negotiate shall be between the MCCFA and the MSBCC. Further, no local or state affiliate has any authority to modify or veto any collective bargaining agreement entered into by the MEA or NEA with their respective professional staffs.

2. The independence of the defendant labor organizations can be found in their constitutional structures. MCCFA, MEA, and NEA each have separate constitutions and bylaws. MEA's articles and bylaws may be amended without NEA or local affiliate approval. MCCFA bylaws may be changed by vote of its membership alone and the NEA is the only group which can amend the NEA constitution and bylaws.

3. The MCCFA, MEA and NEA are separate organizations in that they each have separate representative and delegate assemblies, boards of directors, officers, standing committees and staff.

4. The MCCFA, MEA and NEA each have separate professional staffs. The MCCFA Executive Director was selected by the MCCFA Board of Directors and receives general direction from that Board and daily direction from the MCCFA President. The MEA executive staff makes all major decisions concerning the activities of MEA staff. The NEA is the sole employer of its professional staff. The NEA and its professional staff do not engage in any generalized supervision of the professional staff of any state or local affiliate, including the MEA and MCCFA, nor does any local or state affiliate or their staffs have any supervisory responsibilities concerning the NEA professional staff.

5. MCCFA, MEA and NEA exercise independent policy and goal decisions. State and local associations have no authority to participate in, modify, or veto a goal or program adopted by NEA. Conversely, state and local affiliates, including MEA and MCCFA, determine their own goals and programs; NEA does not have authority to participate in this process, modify or veto a goal or program adopted by a state or local affiliate.

6. In terms of the budgetary process, NEA, MEA and MCCFA are separate and independent. NEA determines its own budget and makes its own expenditure decisions; no state or local affiliate has any authority to interfere. In like manner the MEA determines its own budget and makes its own expenditure decisions; national and local affiliates have no power to interfere with this process. The MCCFA Board of

Directors determines MCCFA's budget; NEA and MEA have not attempted to determine how MCCFA spends its funds and have no requirements as to how the funds should be expended.

7. The relationship of the NEA, MCCFA and MEA is set forth in the affiliation agreement which is the basic document defining the rights, duties, and obligations of the respective organizations; no party can unilaterally change or modify that contract. Under this agreement, MCCFA's only obligation to MEA and NEA is to pay dues. The affiliation agreement provides that except for the unified dues, MCCFA shall retain its autonomy, elect its own officers, hold its own meetings, adopt rules and policies, and maintain autonomy in all areas as specified under the constitution of MCCFA.

8. The NEA-PAC Steering Committee and NEA officers and directors are separate and the NEA Executive Committee has no power to modify NEA-PAC's proposed budget.

9. IMPACE funding decisions and other activities are final and have never been altered by the MCCFA, MEA or NEA. IMPACE contracts and pays for the services of certain MEA staff members together with paying MEA for IMPACE's office space and other support service needs. The MEA's only role concerning the governance of IMPACE is that the MEA President nominates and the MEA Board of Directors approves appointments to IMPACE's Board of Directors.

10. NEA, MEA, MCCFA, NEA-PAC, IMPACE and Uni-Serv do have some goals in common and have adopted procedures for cooperating in sharing information and achieving those goals. Disaffiliation has resulted from disagreement over policy goals.

11. NEA, MEA, MCCFA, NEA-PAC and IMPACE provide to or share with one another various services and facili-

ties. Officials, staff personnel, and representatives of NEA, MEA, MCCFA, NEA-PAC and IMPACE regularly attend meetings with one another, plan certain cooperative programs, report to their respective organizations concerning the activities of the other organizations, and maintain continuous channels of communications among themselves.

12. In organizational science, "integration" means that various entities are interdependent or interconnected to the point of functioning as one unit, or that members of various entities collaborate and coordinate their activities toward some unified effort or purpose.

13. Two expert witnesses in organizational science, Prof. Craig E. Schneier and Prof. Cyril P. Morgan, testified on behalf of plaintiffs that defendant labor organizations are integrated. These witnesses acknowledged that there were various basic facts raising questions or doubts as to whether these organizations were in fact integrated. The witnesses did not have sufficient facts upon which to offer a reliable opinion concerning whether the NEA and the other more than 50 state associations and 10,000 local associations were integrated. No expert witness in organizational science testified on behalf of the defendant labor organizations or the state official defendants.

14. In summary, while NEA, MEA, NEA-PAC, IMPACE and MCCFA do share some common goals and policies and in limited circumstances some personnel, in practice they operate as separate and distinct organizations in their (1) collective bargaining functions; (2) constitutional structures; (3) goal and policy determinations; (4) budgetary and financial activities; and (5) management operations.

VI. ALLEGED ABRIDGMENT OF FREE SPEECH

1. Minn. Stat. 6179.65, subd. 1, in relevant part provides: Nothing contained in sections 179.61 to 179.76 shall be construed to limit, impair or affect the right of any public employee or his representative to the expression or communication of a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative if there be one; nor shall it be construed to require any public employee to perform labor or services against his will.

2. Prior to the first collective bargaining agreement that MCCFA negotiated as exclusive representative under PELRA in 1973, there were "faculty senates" or "faculty councils" at each of the community colleges. The purpose of these senates or councils was to facilitate a formal organized dialogue between faculty and college administrators concerning college policies.

3. Under the system in effect prior to 1973, each faculty member was eligible for election to the committee in which curriculum, academic standards, and college policies were established. All resolutions passed by the faculty senate were subject to a further review process at the general faculty assembly. Tenure decisions were based in part on the recommendation of a three-person committee composed of department members chosen by the instructor being evaluated. Division chairmen were elected by members of each academic division.

4. In 1973, with the inception of PELRA, "meet and confer" and "exchange of views" committees replaced the faculty senates and councils as the collective representatives through which a formal organized dialogue is conducted with the administration concerning college policies. There are "exchange of views" or "meet and confer" committees covering such areas as curriculum, fiscal/personnel, student services and general matters. With the institution of the first master contract setting forth the negotiated terms and conditions of employment, the division chairman concept was discontinued as was the tenure evaluation system.

5. Both before and after the passage of PELRA and the existence of the first bargaining agreement, the community college administration has possessed the sole and final authority to determine policy after having received the views and concerns of the faculty.

6. Prior to the passage of PELRA and the existence of the first bargaining agreement, the MSBCC recognized the predecessor organization of the MCCFA as the faculty representative for purposes of discussing and in some cases agreeing upon subjects such as salary structure and leaves. One of the plaintiffs, Leon Knight, was the president of this predecessor organization and served as the faculty representative in such discussions with the MSBCC.

7. Under PELRA the employer has the obligation to meet and confer in good faith with the exclusive representative to exchange views and concerns relating to employment which are not specifically "terms and conditions" of employment subject to collective bargaining.

8. Although there is not a provision in the MCCFA's constitution or an articulated policy specifically precluding a nonunion member from becoming a member of a meet and

confer or exchange of views committee, as a practical matter, such committee membership does not occur if the faculty member is not a member of the MCCFA.

9. This practice, while precluding non-members of MCCFA from participating in the formal meet and confer process, does provide a formal, orderly process by which the views and concerns of the employer and employees may be exchanged.

10. Non-members of MCCFA may and have engaged in numerous alternative means of communication with college administrators concerning the views and concerns of these faculty members. Opportunities for communication with the college administration include breakfast meetings, afternoon meetings, and informal meetings at any other time as part of the administration's open door policy.

11. The MSBCC has never denied any of its employees the opportunity to communicate to board members on any subject related to matters affecting the community college, and the college administrators have not precluded faculty members, including the plaintiffs, from expressing their views and concerns to the administration or the board.

12. Neither the plaintiffs nor the college administration have ever been informed by any MCCFA representative that non-members were precluded from expressing their views and concerns to the college administration.

13. Plaintiff Knight acknowledged he has the right to submit his views or speak directly to the administration or College officials and that the president and academic dean at his college have an open door policy to talk at any time on any subject. Plaintiff Kjer has been specifically invited by the president of his campus to general faculty discussions where he is free to express his views. Plaintiff Lievense stated the op-

portunity to communicate with the administration is as free now as it was in the past and that he has expressed his opinions to the administration on all subjects of concern to him.

14. The state meet and confer and campus exchange of views meetings, while open, are not meetings at which the general public or individual faculty members are provided a forum to discuss any matters of interest to them. There are other opportunities for the public or individual faculty members to express their views on matters relating to campus affairs.

15. The plaintiffs' ability and freedom to communicate their opinions and concerns involved in their employment to the MSBCC and the college administration has not been repressed or abrogated since the MCCFA became the exclusive representative for the community college faculty. The plaintiffs have retained and exercise their opportunities to communicate directly with the MSBCC and the college administration concerning a broad range of subjects relating to their employment.

VII. EXPERT TESTIMONY: KRAUSS, PETRO, BRADLEY, DERBER

1. Two expert witnesses in political economy, Professor M. B. Krauss of New York University and Consulting Economist Dr. P. D. Bradley, testified on behalf of plaintiffs concerning what they perceive to be the substantial equivalence of collective bargaining and exclusive representation under PELRA as compared with the National Industrial Recovery Act (NIRA) and the Bituminous Coal Conservation Act (BCCA). Dr. Bradley and Professor Krauss contend that PELRA, NIRA and BCCA are historically related, functionally equivalent, and structurally identical. Professor Krauss contends, and Dr. Bradley concurs, that PELRA is an example

of the "corporate state" form of economic organization once found in fascist Italy.

2. Dr. Milton Derber, Professor of Labor and Industrial Relations, University of Illinois, testified as an expert witness on behalf of the state defendants. According to Dr. Derber, the comparison of PELRA to a corporate state model is misleading and inappropriate because there is no commonly accepted corporate state model. Further, while there are many possible models of corporatism, the model used by the plaintiffs is inappropriate, simplistic, and does not lead to a correct analysis of PELRA because it does not take into consideration factors such as the complexities of our governmental system, the checks and balances inherent in the system, the distribution of power, and division of responsibilities within government as to the allocation of resources. Finally, Dr. Derber testified that Professor Krauss' and Dr. Bradley's comparison of PELRA to NIRA and BCCA is inaccurate because it does not take into consideration critical historical differences such as the serious domestic crisis in the United States at the time the latter laws were enacted, the conditions which led to the enactment of PELRA, and the important differences between public and private sectors.

3. Professor Sylvestor Petro, plaintiffs' expert witness in political theory, testified that compulsory public sector collective bargaining is inconsistent with governmental and popular sovereignty. Mr. Petro's sovereignty argument is based solely on the preamble of the United States Constitution.

4. The testimony of plaintiffs' witnesses Krauss, Petro, and Bradley, being of little relevancy, has not otherwise been referenced in these Findings of Fact.

VIII. SUBSTANTIAL STATE INTEREST SUPPORTING PUBLIC SECTOR COLLECTIVE BARGAINING

1. The State of Minnesota has a legitimate interest in promoting orderly and constructive relationships between public employers and employees. Unresolved disputes between public employers and their employees are detrimental to the public interest as well as to the interests of the involved parties.

2. The State of Minnesota has determined that enactment of the Public Employment Labor Relations Act is the means by which it can best deal with its employees in a fair, efficient and peaceful fashion.

3. A statutory system which permits employees in a unit to be represented by an exclusive representative results in the avoidance of confusion, conflicting demands, and dissension that would result from more than one representative claiming to represent all the employees in an employee unit.

4. Exclusive representation institutionalizes employer/employee conflict and provides a more stable method of dealing with such conflict. Further, exclusive representation allows public managers to deal with one organization concerning a particular group of employees; this has a stabilizing effect and removes the barrier to effective communication which exists with multiple unionism.

5. The State of Minnesota has a legitimate interest in maintaining "labor peace" by entering into agreements with an exclusive representative for each employee unit, which agreements are not subject to direct challenge by rival employee organizations claiming to represent the same employees in each unit. The available information in the area of labor and industrial relations indicates that collective bargaining through exclusive representation leads to increased labor stabilization and less labor strife.

6. The general citizenry benefits from collective bargaining through exclusive representation by the elimination of conflict over representation, the reduction of barriers to effective communication, and the elimination of employee groups being played off against one another. It has been determined by the legislature that relationships between the public, the public employees, and their employer implies a degree of responsibility to the public which is different from employment in the private sector. As unresolved disputes between the public employer and its employees are injurious to the public as well as the parties, the state has adopted exclusive representation as a means of minimizing such disputes and providing for their resolution. This is the express policy of PELRA.

7. Minn. Stat. §179.74, subd. 5, as originally enacted in 1971 and applicable to state employees, including the community college faculty, provided:

> The negotiating team is authorized to and may enter into tentative agreements to be submitted to the legislature.

Minn. Stat. §179.74, subd. 5, as amended in 1973 provided in relevant part:

> The commissioner of personnel is authorized to and may enter into agreements. The provisions of said agreements which establish wages and economic fringe benefits shall be submitted to the legislature to be accepted, rejected or modified.

In 1979 Minn. Stat. §179.74, subd. 5, was amended and presently provides:

> The commissioner of employee relations is authorized to and may enter into agreements with exclusive representatives of the units specified in section 179.741, subdivision 1. The provisions of the negotiated agreements and

arbitration awards shall be submitted to the legislature to be accepted or rejected in accordance with this section and section 3.855. In the event that a proposed agreement or arbitration award is rejected or is not approved by the legislature prior to its adjournment in an odd numbered year, the legislative commission on employee relations is authorized to give interim approval to a proposed agreement or arbitration award. The proposed agreement or arbitration award shall be implemented upon its approval by the commission and state employees covered by the proposed agreement or arbitration award shall not have the right to strike while the interim approval is in effect. The commission shall submit the agreement or arbitration award to the legislature for ratification at a special legislative session called to consider it or at its next regular legislative session. Wages and economic fringe benefit increases provided for in the agreement or arbitration award which were paid pursuant to the interim approval by the commission shall not be affected but such wages and benefit increases shall cease to be paid or provided effective upon the rejection of the agreement or arbitration award or upon adjournment by the legislature without acting upon the agreement or arbitration award.

Respectfully submitted,
LEONARD E. LINDQUIST
Special Master

Dated: March 23, 1981.

(Caption)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Minnesota State Board for Community Colleges, one of the defendants in this action, hereby appeals to the Supreme Court of the United States from the Order for Judgment, paragraphs 1, 2, and 3, entered in this action on March 31, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1253.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil Action No. 4-74-659

LEON W. KNIGHT, MORGAN KJER, DONALD A. DAHLIN, JAMES D. WALLACE, TERRENCE D. FLORIN, WILLIAM B. BAUMAN, HAROLD J. GARDNER, THOMAS J. PATIN, EUGENE D. MIELKE, DR. RICHARD A. THOMPSON, DAVID R. GROUT, JOAN M. FARKAS, GARY LEE NELSON, RONALD LIEVENSE, LUCILLE JOHNSON, VIRGINIA E. LANEGRAN, MAX A. MALMQUIST, RALPH G. POWELL, RICHARD D. ISENHART, CRESSTON GACKEL,

Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION; MINNESOTA EDUCATION ASSOCIATION; INDEPENDENT MINNESOTA POLITICAL ACTION COMMITTEE FOR EDUCATION; NATIONAL EDUCATION ASSOCIATION; JAMES A. NORMAN, individually and in his former official capacity as President, Minnesota Community College Faculty Association; JAMES K. DURHAM, individually and in his official capacity as Vice President, Minnesota Community College Faculty Association; ROBERT BELL, individually and in his official capacity as Secretary, Minnesota Community College Faculty Association; CALVIN MINKE, individually and in his official capacity as Treasurer, Minnesota Community College Faculty Association; RALPH S. CHESEBROUGH, individually and in his official capacity as Executive Secretary, Minnesota Community College Facul-

ty Association; DONALD HOLMAN, individually and in his official capacity as Minnesota Education Association Representative, Minnesota Community College Faculty Association; WILLIAM M. MONDALE, individually and in his former official capacity as President, Minnesota Education Association; JAMES ROSASCO, individually and in his former official capacity as President, 1973-74, Minnesota Education Association; ALFRED F. PROVO, individually and in his former official capacity as Treasurer, Minnesota Education Association; ALBERT L. GALLOP, individually and in his official capacity as Executive Director, Minnesota Education Association; FULTON B. KLINKERFUES, individually and in his former official capacity as President, Independent Minnesota Political Action Committee for Education; JANET R. MORGAN, individually and in her former official capacity as Vice President, Independent Minnesota Political Action Committee for Education; JOHN W. SCHUTT, individually and in his official capacity as Treasurer, Independent Minnesota Political Action Committee for Education; JAMES A. HARRIS, individually and in his former official capacity as President, National Education Association; HELEN D. WISE, individually and in her former official capacity as President, 1973-74, National Education Association; CATHERINE O'C. BARRETT, individually and in her former official capacity as President, 1972-73, National Education Association; TERRY E. HERNDON, individually and in his official capacity as Executive Secretary, National Education Association; SAM E. LAMBERT, individually and in his former official capacity as Executive Secretary, 1972-73, National Education Association; RAYMOND CRIPPEN, ROSEMARY McVAY, JOHN SONTOROVICH, HUGH V. PLUNKETT III, ARLEENE NYCKLEMOE, DOUGLAS

ALAN BRUCE, RONALD H. DENISON, EDWARD G. ZIEGLER, VAL BJORNSON, CHARLES SWANSON, individually; PHILLIP C. HELLAN, individually and in his official capacity as Chancellor of the Minnesota Community Colleges; JOHN F. HELLING, individually and in his official capacity as President, North Hennepin Community College; DALE A. LORENZ, individually and in his official capacity as President, Normandale Community College; NEIL CHRISTENSON, in his official capacity as President, Anoka-Ramsey Community College; WAYNE S. BURGGRAAFF, in his official capacity as Minnesota Commissioner of Finance; JAMES LORD, in his official capacity as Minnesota State Treasurer; PETER OBERMEYER, in his official capacity as Director of the Minnesota State Bureau of Mediation Services; WILLARD H. McGUIRE, in his official capacity as President, National Education Association; ROGER JOHNSON, in his official capacity as Chairman, Independent Minnesota Political Action Committee for Education; DONALD C. HILL, in his official capacity as President, Minnesota Education Association; TOYSE KYLE, ELMA PONTO, JOSEPH NORQUIST, NADINE CHASE, PAUL BRINKMAN, in their official capacities as members of the Minnesota State Board of Community Colleges,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Minnesota Community College Faculty Association, the Minnesota Education Association and the National Education Association, defendants in the above-captioned matter, hereby appeal to the Supreme Court of the United States from the final order the court entered in this action on March 31, 1982, and reaffirmed by an order entered on August 13, 1982. The parts of the court's orders appealed from are as follows:

(1) The court's ruling that an exclusive representative may not constitutionally retain exclusive control over selection of the membership of meet and confer committees (Sections 1, 2 and 3 of the court's Order for Judgment).

(2) The court's ruling that twenty per cent of plaintiffs' costs be taxed against the Minnesota Community College Faculty Association and the Minnesota State Board of Community Colleges.

This appeal is taken pursuant to 28 U.S.C. § 1253.

OPPENHEIMER, WOLFF, FOSTER, SHEPARD AND DONNELLY
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Date: October 12, 1982.

PUBLIC EMPLOYMENT LABOR RELATIONS ACT OF 1971

179.61 PUBLIC POLICY.

It is the public policy of this state and the purpose of sections 179.61 to 179.76 to promote orderly and constructive relationships between all public employers and their employees, subject however, to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety and welfare.

The relationships between the public, the public employees, and their employer governing bodies imply degrees of responsibility to the people served, need of cooperation and employment protection which are different from employment in the private sector. So also the essentiality and public desire for some public services tend to create imbalances in relative bargaining power or the resolution with which either party to a disagreement presses its position, so that unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary.

Unresolved disputes between the public employer and its employees are injurious to the public as well as to the parties; adequate means must therefore be established for minimizing them and providing for their resolution. Within the foregoing limitations and considerations the legislature has determined that overall policy may best be accomplished by:

(1) granting to public employees certain rights to organize and choose freely their representatives;

(2) requiring public employers to meet and negotiate with public employees in an appropriate bargaining unit and providing for written agreements evidencing the result of such bargaining; and

(3) establishing special rights, responsibilities, procedures and limitations regarding public employment relationships which will provide for the protection of the rights of the public employee, the public employer and the public at large.

179.63 DEFINITIONS.

Subdivision 1. For the purposes of sections 179.61 to 179.76 the terms defined in this section have the meanings given them.

Subd. 5. "Employee organization" means any union or organization of public employees whose purpose is, in whole or in part, to deal with public employers concerning grievances and terms and conditions of employment.

Subd. 6. "Exclusive representative" means an employee organization which has been designated by a majority of those votes cast in the appropriate unit and has been certified pursuant to section 179.67.

Subd. 10. "Professional employee" means:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes;

Subd. 15. "Meet and confer" means the exchange of views and concerns between employers and their respective employees.

Subd. 16. "Meet and negotiate" means the performance of the mutual obligations of public employers and the exclusive representatives of public employees to meet at reasonable times, including where possible meeting in advance of the budget making process, with the good faith intent of entering into an agreement with respect to terms and conditions of employment; provided, that by such obligation neither party is compelled to agree to a proposal or required to make a concession.

Subd. 18. The term "terms and conditions of employment" means the hours of employment, the compensation therefor including fringe benefits except retirement contributions or benefits, and the employer's personnel policies affecting the working conditions of the employees. In the case of professional employees the term does not mean educational policies of a school district. The terms in both cases are subject to the provisions of section 179.66 regarding the rights of public employers and the scope of negotiations.

179.65 RIGHTS AND OBLIGATIONS OF EMPLOYEES.

Subdivision 1. Nothing contained in sections 179.61 to 179.76 shall be construed to limit, impair or affect the right of any public employee or his representative to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative if there be one;

nor shall it be construed to require any public employee to perform labor or services against his will. If no exclusive representative has been certified, any public employee individually, or group of employees through their representative, shall have the right of expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment or their betterment, by meeting with their public employer or his representative so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment.

Subd. 3. Public employees who are professional employees as defined by section 179.63, subdivision 10, have the right to meet and confer with public employers regarding policies and matters not included under section 179.63, subdivision 18, pursuant to section 179.73.

Subd. 4. Public employees through their certified exclusive representative have the right and obligation to meet and negotiate in good faith with their employer regarding grievance procedures and the terms and conditions of employment, but such obligation does not compel the exclusive representative to agree to a proposal or require the making of a concession.

179.66 RIGHTS AND OBLIGATIONS OF EMPLOYERS.

Subdivision 1. A public employer is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel. No public employer shall sign an agreement which limits the right of

the public employer to select persons to serve as supervisory employees or state managers pursuant to section 43.127 or requires the use of seniority in their selection.

Subd. 2. A public employer has an obligation to meet and negotiate in good faith with the exclusive representative of the public employees in an appropriate unit regarding grievance procedures and the terms and conditions of employment, but such obligation does not compel the public employer or its representative to agree to a proposal or require the making of a concession.

Subd. 3. A public employer has the obligation to meet and confer with professional employees to discuss policies and those matters relating to their employment not included under section 179.63, subdivision 18, pursuant to section 179.73.

Subd. 7. The employer shall not meet and negotiate or meet and confer with any employee or group of employees who are at the time designated as a member or part of an appropriate employee unit except through the exclusive representative if one is certified for that unit or as provided for in section 179.69, subdivision 1, provided that this subdivision shall not be deemed to prevent the communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is a part of the employee's work assignment.

179.67 EXCLUSIVE REPRESENTATION; ELECTIONS; DECERTIFICATION.

Subdivision 1. Any employee organization holding formal recognition by order of the director or by employer voluntary recognition on the effective date of Extra Session Laws 1971, Chapter 33 under any law that is repealed by Extra Session Laws 1971, Chapter 33 is hereby certified as the exclusive representative until such time as it is decertified or another

representative is certified in its place pursuant to sections 179.61 to 179.76. Any teacher organization as defined by section 125.20, subdivision 3 who on the effective date of Extra Session Laws 1971, Chapter 33 has a majority of its members on a teacher's council in a school district as provided in section 125.22 is hereby certified as the exclusive representative of all teachers of that school district until such time as the organization is decertified or another organization is certified in its place pursuant to sections 179.61 to 179.76.

Subd. 2. An employee organization may be certified as the exclusive representative of public employees in an appropriate unit upon complying with and qualifying under the provisions of this section.

Subd. 3. The director may certify an employee organization as an exclusive representative in an appropriate unit upon the joint request of the employer and the organization if, after investigation, he finds that no unfair labor practice was committed in initiating and submitting the joint request and that the employee organization does in fact represent over 50 percent of the employees in the appropriate unit. The provisions of this subdivision shall not in any case reduce the time period or nullify any bar to the employee organization's certification existing at the time of the filing of the joint request.

Subd. 4. Any employee organization may obtain a certification election upon petition to the director wherein it is stated that at least 30 percent of the employees of a proposed employee unit wish to be represented by the petitioner. Any employee organization may obtain a representation election upon petition to the director wherein it is stated that the currently certified representative no longer represents the majority of employees in an established unit and that at least 30 percent of the employees in the established unit wish to be represented

by the petitioner rather than by the currently certified representative. An individual employee or group of employees in a unit may obtain a decertification election upon petition to the director wherein it is stated that the certified representative no longer represents the majority of the employees in an established unit and that at least 30 percent of the employees wish to be unrepresented.

Subd. 4a. The director shall not consider a petition for a decertification election during the effective term of a contract covering employees of the executive branch of the state of Minnesota except for a period for not more than 270 to not less than 210 days before its date of termination.

Subd. 5. The director shall, upon receipt of an employee organization's petition to the director wherein it is stated that at least 30 percent of the employees of a proposed employee unit wish to be represented by the petitioner or that the exclusive representative of a unit no longer represents the majority of the employees in the unit, investigate to determine if sufficient evidence of a question of represntation exists and hold hearings as necessary to determine the appropriate unit and such other matters as may be necessary to determine the representation rights of the affected employees and employer.

Subd. 6. In determining the numerical status of an employee organization for purposes of subdivisions 2, 3, 4, and 8, the director shall require representation authorization signatures of affected employees as verification of the statements contained in the joint request or petitions. Such authorization signatures shall be privileged and confidential information available to the director only and shall be dated.

Subd. 7. An employee organization shall be certified as the exclusive representative of an appropriate unit upon receiving

a majority of those votes cast in the appropriate unit at a certification election.

Subd. 8. The director shall issue his order providing for a secret ballot election by the employees in a designated appropriate unit. The election shall be held in the premises where those voting are employed unless the director shall determine that the election cannot be fairly held, in which case it shall be held at such a place as the director shall determine.

Subd. 9. The ballot in a certification election may contain as many names of representative candidates as have demonstrated that the candidate has 30 percent of the employees in the unit desiring it as their exclusive representative. The Ballots shall, in every case, contain an appropriate space for employees to indicate that no representation is desired.

Subd. 10. The director shall provide for and count absentee ballots in all elections.

Subd. 11. If no choice on the ballot receives a majority of those votes cast in the unit, the director shall conduct a run off election wherein the ballot shall contain only the two choices receiving the greater number of votes.

Subd. 12. Upon a representative candidate receiving a majority of those votes cast in a unit, the director shall certify that representative candidate as the exclusive representative of all employees in the unit.

Subd. 13. Upon a finding by the director of an unfair labor practice being committed by an employer or representative candidate or an employee or group of employees, which unfair labor practice affected the result of an election held pursuant to this section, the director may void such election result and order a new election.

Subd. 14. Upon the director certifying an exclusive representative, he shall not consider the question again for a

period of one year, unless the exclusive representative is decertified by a court of competent jurisdiction, or by the director as authorized by section 179.71.

179.73 POLICY CONSULTANTS.

Subdivision 1. The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas regarding all matters not specified under section 179.63, subdivision 18.

Subd. 2. The professional employees shall select a representative to meet and confer with a representative or committee of the public employer on matters not specified under section 179.63, subdivision 18 relating to the services being provided to the public. The public employer shall provide the facilities and set the time for such conferences to take place, provided that the parties shall meet together at least once every four months.

EMPLOYMENT CONTRACT
1981-83
Between
STATE OF MINNESOTA/
MINNESOTA STATE BOARD FOR
COMMUNITY COLLEGES
and
MINNESOTA COMMUNITY COLLEGE
FACULTY ASSOCIATION

ARTICLE I
RECOGNITION

The Employer recognizes the Association as the exclusive bargaining representative for all instructors, counselors, and librarians who work more than 14 hours per week or more than 35% of a normal work week and more than 100 work days per calendar year; excluding presidents, vice presidents, assistants to presidents, administrative assistants, deans, assistant deans, associate deans, directors, assistant directors, and all classified personnel. In accordance with the Bureau of Mediation Services Case No. 80-PR-1300A, the term "employee," when used hereinafter in the Contract shall refer to all employees of the designated bargaining unit, and reference shall include both male and female employees.

The Employer will not during the life of this Contract meet and negotiate or meet and confer relative to terms and conditions of employment with any employee or group of employees who are covered by this Contract except through the exclusive bargaining representative.

If titles or positions are created during the life of this Contract that are not listed above, the parties will meet and attempt to agree on the inclusion or exclusion of the new title

or position. If the parties cannot agree, the question will be submitted to the Director of the Bureau of Mediation Services for a determination of the inclusion or exclusion of such title.

ARTICLE V
MANAGEMENT RIGHTS

It is recognized that except as expressly stated herein the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the colleges in all of their various aspects, including but not limited to, the educational policies of the colleges; the right to select, direct, and assign employees; to schedule working hours; to determine whether goods or services should be made or purchased; to make and enforce reasonable rules and regulations affecting terms and conditions of employment that are uniformly applied and enforced in accordance with the provisions of the rules or regulations. Any term or condition of employment not specifically established by this Contract shall remain solely within the discretion of the Employer to modify, establish or eliminate.

ARTICLE VI
ASSOCIATION RIGHTS

Sec. 5. ASSOCIATION LOCAL COMMITTEES. The Association shall establish from one to six committees. Membership on each committee shall not exceed six. The number of committees may be limited to three at the College President's request or to a lesser number with Local Association agreement. Committees will be assigned responsibility for one or more of the following topic areas: Personnel, Student Affairs, Curriculum, Facilities, Fiscal Matters, and General Matters. The exchange of views process is recognized as being a significant and necessary part of the local campus operation.

* * *

Section 6. ASSOCIATION STATE COMMITTEE. The State Association shall establish a committee of no more than eight members to meet and confer with the Minnesota State Community College Board for discussion and mutual exchange of ideas regarding statewide matters which are considered significant by the State Association or the Employer. The Employer shall provide the facilities and set the time for such conferences to take place, and such conferences shall be held at least three times a year. Agenda will be prepared and distributed one week in advance by the Board President or designee and will include all items submitted by the State Association. The agenda shall also include all items submitted by the Board President.

Section 7. ACCESS TO INFORMATION. Upon request, the Employer or the employer's designees agree to provide the Association at state and local levels information available to it concerning the professional staffing and financial resources of the Minnesota Community Colleges, including routine reports, registry of professional personnel, tentative budgetary requirements and allocations, agendas and minutes of Board meetings, names and addresses and position on the salary schedule of all employees in the bargaining unit, and such other information requested by the Association in contract matters or in the processing of a grievance.

Office-Supreme Court, U.S.
FILED
JUN 22 1983
ALEXANDER L. STEVAS,
CLERK

JOINT APPENDIX

IN THE

Supreme Court of the United States

October Term, 1982

Nos. 82-977 and 82-898

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION, et al.,

Appellants,

v.

LEON W. KNIGHT, et al.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

JURISDICTIONAL STATEMENTS FILED NOVEMBER 30, 1982 AND DECEMBER 10, 1982
REVIEW GRANTED MARCH 28, 1983

224-7633 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7633

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JOINT APPENDIX

IN THE

Supreme Court of the United States

October Term, 1982

Nos. 82-977 and 82-898

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION, et al.,

Appellants,

v.

LEON W. KNIGHT, et al.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil Action No. 4-74-659

LEON W. KNIGHT, MORGAN KJER, DONALD A. DAHLIN, JAMES D. WALLACE, TERRENCE D. FLORIN, WILLIAM B. BAUMAN, HAROLD J. GARDNER, THOMAS J. PATIN, EUGENE D. MIELKE, DR. RICHARD A. THOMPSON, DAVID R. GROUT, JOAN M. FARKAS, GARY LEE NELSON, RONALD LIEVENSE, LUCILLE JOHNSON, VIRGINIA E. LANEGRAN, MAX A. MALMQUIST, RALPH G. POWELL, RICHARD D. ISENHART, CRESSTON GACKEL,

Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION; MINNESOTA EDUCATION ASSOCIATION; INDEPENDENT MINNESOTA POLITICAL ACTION COMMITTEE FOR EDUCATION; NATIONAL EDUCATION ASSOCIATION; JAMES A. NORMAN, individually and in his former official capacity as President, Minnesota Community College Faculty Association; JAMES K. DURHAM, individually and in his official capacity as Vice President, Minnesota Community College Faculty Association; ROBERT BELL, individually and in his official capacity as Secretary, Minnesota Community College Faculty Association; CALVIN MINKE, individually and in his official capacity as Treasurer, Minnesota Community College Faculty Association; RALPH S. CHESEBROUGH, individually and in his official capacity as Executive Secretary, Minnesota Community College Facul-

ty Association; DONALD HOLMAN, individually and in his official capacity as Minnesota Education Association Representative, Minnesota Community College Faculty Association; WILLIAM M. MONDALE, individually and in his former official capacity as President, Minnesota Education Association; JAMES ROSASCO, individually and in his former official capacity as President, 1973-74, Minnesota Education Association; ALFRED F. PROVO, individually and in his former official capacity as Treasurer, Minnesota Education Association; ALBERT L. GALLOP, individually and in his official capacity as Executive Director, Minnesota Education Association; FULTON B. KLINKERFUES, individually and in his former official capacity as President, Independent Minnesota Political Action Committee for Education; JANET R. MORGAN, individually and in her former official capacity as Vice President, Independent Minnesota Political Action Committee for Education; JOHN W. SCHUTT, individually and in his official capacity as Treasurer, Independent Minnesota Political Action Committee for Education; JAMES A. HARRIS, individually and in his former official capacity as President, National Education Association; HELEN D. WISE, individually and in her former official capacity as President, 1973-74, National Education Association; CATHERINE O'C. BARRETT, individually and in her former official capacity as President, 1972-73, National Education Association; TERRY E. HERNDON, individually and in his official capacity as Executive Secretary, National Education Association; SAM E. LAMBERT, individually and in his former official capacity as Executive Secretary, 1972-73, National Education Association; RAYMOND CRIPPEN, ROSEMARY McVAY, JOHN SONTOROVICH, HUGH V. PLUNKETT III, ARLEENE NYCKLEMOE, DOUGLAS

ALAN BRUCE, RONALD H. DENISON, EDWARD G. ZIEGLER, VAL BJORNSON, CHARLES SWANSON, individually; PHILLIP C. HELLAND, individually and in his official capacity as Chancellor of the Minnesota Community Colleges; JOHN F. HELLING, individually and in his official capacity as President, North Hennepin Community College; DALE A. LORENZ, individually and in his official capacity as President, Normandale Community College; NEIL CHRISTENSON, in his official capacity as President, Anoka-Ramsey Community College; WAYNE S. BURGGRAAFF, in his official capacity as Minnesota Commissioner of Finance; JAMES LORD, in his official capacity as Minnesota State Treasurer; PETER OBERMEYER, in his official capacity as Director of the Minnesota State Bureau of Mediation Services; WILLARD H. McGUIRE, in his official capacity as President, National Education Association; ROGER JOHNSON, in his official capacity as Chairman, Independent Minnesota Political Action Committee for Education; DONALD C. HILL, in his official capacity as President, Minnesota Education Association; TOYSE KYLE, ELMA PONTO, JOSEPH NORQUIST, NADINE CHASE, PAUL BRINKMAN, in their official capacities as members of the Minnesota State Board of Community Colleges,

Defendants.

Date Docket No. Proceedings

1-30-75—6—Filed amended complaint and request for a three-judge district court with aff. of service by mail on 1-30-75.

2-12-75—7—Filed separate answer of Crippen, McVay, Sontorovich, Plunkett, Nycklemoe, Bruce, Helland, Helling, Lorenz and Denison with aff. of service by mail on 2-10-75.

2-12-75—8—Filed separate answer of Ziegler and Bjornson with aff. of service by mail on 2-10-75.

2-12-75—9—Filed separate answer of Swanson with aff. of service by mail on 2-10-75.

2-13-75—10—Filed notice of motion returnable 2-28-75 at 9:00 AM and motion of pltfs' to convene a statutory three-judge court with aff. of service by mail on 2-13-75.

12-23-75—22—Filed Memorandum and Order (Alsop, J) dated 12-22-75 as follows: IT IS ORDERED that plaintiffs' motion to convene a three-judge court be, and the same hereby is denied.

IT IS FURTHER ORDERED that defendants' motion to stay or dismiss be, and the same hereby is denied.

2-11-76—24—ANSWER OF MCCFA, MEA, IMPOAFE (sic), NEA, NORMAN, DURHAM, BELL, MINKE, Chesebrough, Holman, Mondale, Rosasco, Provo, Gallop, Klinkerfues, Morgan, Schutt, Harris, Wise, Barrett, Herndon and Lambert.

5-20-76—30—OPINION from the Eighth Circuit Court of Appeals granting petition for writ of mandamus to compel the convention of a three-judge court.

5-26-76—32—ORDER (Floyd R. Gibson, Chief Judge, U. S. Court of Appeals for the 8th Circuit) hereby designates the Honorable Gerald W. Heaney, United States Circuit Judge, and the Honorable Earl R. Larson, United States District Judge for the District of Minnesota to serve with the Honorable Donald A. Alsop, United States District Judge for the District of Minnesota to hear and determine the action.

10-17-78—IV-2—ORDER (Alsop, J) dated 10-16-78 as follows:

IT IS ORDERED that all discovery in this action be closed as of December 31, 1978, save and except plaintiffs' responses to defendants' contention interrogatories, which responses shall be served and filed on or before January 15, 1979.

IT IS FURTHER ORDERED that on or before January 30, 1979, the parties prepare, execute and file with the court a stipulation of undisputed facts.

IT IS FINALLY ORDERED that a further pretrial conference be had in the above action on February 2, 1979 at 9:30 o'clock a.m.

1-12-79—V-15—NOTICE OF PLTFS' MOTION TO RESCIND ORDER OF 10-13-78 AND GRANTING OTHER RELIEF RET. 2-2-79 at 9:30 A.M.

2-1-79—V-33—NOTICE AND MOTION OF PLTFS. TO RESCIND COURT'S ORDER OF 10-13-78 AND FOR AN ORDER COMMANDING PRODUCTION OF CERTAIN FILES MAINTAINED BY, THE DEPOSITIONS OF CERTAIN STAFF-PERSONNEL OF, AND THE PAYMENT OF CERTAIN COSTS AND FEES, RET. 1-26-78 at 2:00 P.M.

4-9-79—V-54—ORDER (Heaney, Larson, Alsop, J) dated 4-4-79 as follows:

IT IS ORDERED that the motion of plaintiffs as hereinabove set forth be and the same hereby is in all things denied.

IT IS FURTHER ORDERED that the motion of the defendants National Education Association, Minnesota Education Association and their officers and staff as hereinbefore set forth be and the same hereby is in all things denied.

IT IS FURTHER ORDERED that on or before May 7, 1979 each of the parties meet, prepare, and enter into a stipulation of undisputed facts. On or before May 21, 1979 counsel for each party shall prepare, file and serve upon opposing counsel a statement setting forth all facts in issue which remain unresolved and which it proposes to submit to the court for determination. On or before June 4, 1979 counsel for each party shall prepare, serve and file a schedule of all exhibits which will be offered in evidence at the trial as part of its case in chief. On or before June 4, 1979 counsel for each party shall make for identification in the sequence proposed to be offered all exhibits intended to be offered at trial. On or before June 4, 1979 counsel for each party shall prepare, serve and file a schedule of depositions or portions thereof it proposes to offer in evidence. On or before June 4, 1979 counsel for each party shall prepare, serve and file a schedule of interrogatories and answers to interrogatories that it proposes to offer in evidence. On or before June 4, 1979 counsel for each party shall prepare, serve and file a full and complete statement of the facts it proposes to prove as part of its case in chief. On or before June 18, 1979 each party shall file a detailed written brief setting forth certain things.

IT IS FINALLY ORDERED that a further hearing herein be conducted by the court on the 29th day of June, 1979 at 9:30 a.m. at the Federal Courts Building in St. Paul.

4-23-79—V-58—NOTICE AND MOTION OF PLTFS. FOR DISSOLUTION OR STAY OF COURT'S ORDER OF 4-4-79 and for reconsideration and hearing on pltfs' motion to rescind court's order of 10-13-78.

5-7-79—VI-8—NOTICE AND MOTION OF PLTFS. FOR DISSOLUTION OR STAY OR COURT'S ORDER OF 4-47-9 and for reconsideration and hearing on Pltfs' motion to rescind Court's Order of 10-13-78 and to reschedule dates for compliance with Court's Order of 4-4-79, with aff. of Edwin Vieira, Jr.

6-21-79—VI-31—ORDER (Alsop, J) that the plaintiffs' various motions to set down for hearing, to reconsider and to rescind the court's order of October 13, 1978 be and the same hereby are in all things denied. IT IS FURTHER ORDERED That the plaintiffs' motion to stay the court's order of April 4, 1979 as now amended by the court's order of June 15, 1979 be and the same hereby is in all things denied. (Dated 6-20-79)

7-18-79—VI-49—MOTION OF PLTFS. FOR LEAVE TO FILE PETITION FOR EXTRAORDINARY WRIT AND PETITION FOR EXTRAORDINARY WRIT, WITH PETITIONERS' APPENDICES. (Separate).

11-19-79—VII-1—MINUTES OF PRETRIAL CONFERENCE (Heaney, Larson & Alsop, J) (Lindberg, R). Ordered that the members of the three judge panel will name a Master within a reasonable period of time to supervise compliance of the court's order of 6-15-79 and take whatever testimony is necessary regarding disputed issues of fact. Order to be issued. The fees and expenses shall be borne by the parties, and the court will decide how the expenses will be distributed. Stipulation of undisputed facts shall be filed by 12-7-79. Master will make no recommendations to the court but will make rulings regarding admissibility & relevancy. Parties may serve and file motions as in the past.

12-14-79—VII-13—ORDER (Heaney, Larson & Alsop, J) THAT: The Honorable Ronald E. Hachey is hereby appointed Special Master, pursuant to Rule 53 of the Fed. R. Civ. P.

IT IS FURTHER ORDERED that the Special Master shall:

1) Conduct conferences, issue orders, and do all other things necessary to supervise compliance with the Order of this court of December 13, 1979, permitting such changes in the deadlines set by that Order as may be necessary in the interests of justice.

2) Take testimony on disputed facts in the above-entitled action and organize them in an understandable fashion, but not make recommendations to the court as to an appropriate decision on the merits.

3) Report to the court on the progress of the parties' compliance with the Order of this court of December 13, 1979, and upon the timing and procedure adopted for the taking of testimony.

IT IS FINALLY ORDERED that the fees of this Special Master shall be paid by the parties in such sums and in such proportions as the court shall determine at a later date. The extent of each party's cooperation with the Special Master will be a factor in this determination. (Dated 12-13-79)

2-1-80—VII-20—PLTF'S MOTION FOR LEAVE OF COURT TO FILE A SECOND AMENDED COMPLAINT AND MEMORANDUM IN SUPPORT.

2-4-80—VII-22—CERTIFIED COPY OF JUDGMENT FROM THE EIGHTH CIRCUIT COURT OF APPEALS that the petition for writ of mandamus be and is hereby denied in accordance with this Court's opinion.

4-25-80—VII-30—ORDER (Heaney, Larson & Alsop-J) THAT: Plaintiff's motion for leave of Court to file a Second Amended Complaint is in all things denied.

IT IS FURTHER ORDERED That:

(1) Toyse Kyle, Elna Ponto, Joseph Norquist, Nadine Chase, Paul Brinkman, Neal Christenson, Wayne S. Burggraaff, James Lord and Peter Obermeyer be added as defendants herein in their official capacities without service of process.

(2) Willard H. McGuire, Donald C. Hill and Roger Johnson be added as defendants herein in their official capacities and a copy of the Amended Complaint be served upon them in person or by certified mail at their last known addresses.

(3) Raymond Crippen, John Santorovich, Hugh V. Plunkett, III, Rosemary McVay, Ronald H. Denison, Edward G. Ziegler, Val Bjornson and Charles Swanson remain as parties to this action other than in their official capacities.

5-5-80—VII-34—PLTF'S MOTION TO RESCIND THE COURT'S ORDER OF 24 APRIL 1980 AND TO REHEAR PLTF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT.

5-21-80—VII-38—ORDER (Heaney, Larson, Alsop, J) It is Ordered that plaintiff's Motion to Rescind the Court's Order of 24 April 1980 and to Re-hear plaintiff's Motion for Leave to File a Second Amended Complaint be and the same hereby is in all things denied. (Dated 5-15-80).

5-30-80—VII-45—STIPULATION DISMISSING THE SECOND CLAIM FOR RELIEF FROM PLAINTIFFS' AMENDED COMPLAINT.

6-9-80—VII-46—AMENDED COMPLAINT (JURY TRIAL DEMANDED) AND REQUEST FOR A THREE-JUDGE DISTRICT COURT.

6-27-80—VII-47—MINUTES OF PROCEEDINGS (Heaney, J) (Undeland, R) Hearing on Pretrial Stipulations and Instructions: Mr. Leonard Lindquist, present at hearing, had been selected, previous to hearing, to act as Special Master, replacing Judge Ronald E. Hachey. Discussions pursuant as to discovery time schedules to be met, re: Expert witness and exhibits. All other discovery is closed. Court indicated Special Master should have his work completed in approximately 90 days, (10-1-80). Counsel and Special Master Mr. Lindquist set the tentative date of August 4th at 10:00 a.m. in the U.S. Courthouse, St. Paul, MN to commence the Evidentiary hearings. Counsel and Special Master further discussed fees and expenses. Court ordered copies of transcript of this hearing be mailed to himself, the Special Master and the Counsel that are present.

3-23-81—IX-66—REPORT OF LEONARD E. LINDQUIST, SPECIAL MASTER. Copy of Report sent to: Dr. Edwin Vieira, Jr., John J. Fogarty, Darel F. Swenson, Messrs. Eric R. Miller, Keith E. Goodwin, Mark D. Anderson, and Donald W. Selzer, Jr., Esqs., Donald J. Mueting, Esq., Special Asst. Atty. General, and Barbara Lindsey Sims, Special Assistant Atty. General.

11-17-81—X-2—FINDINGS OF FACT AND ORDER (Heaney-Alsop-Larson, J) dated 11-16-81 that IT IS HEREBY ORDERED THAT:

1. Each party to this proceeding shall submit proposed conclusions of law based upon the facts as found herein on or before December 9, 1981.

2. Each party may submit a memorandum of points and authorities in support of their position, together with their proposed conclusions. Such memorandum shall not exceed twenty-five (25) pages in length.

3. Final oral argument will be December 16, 1981 at 2:30 o'clock p.m.

3-31-82—X-11—MEMORANDUM OPINION AND ORDER (Heaney-J., Larson-J., and Alsop-J.) (dated 3-30-82).

4-8-82—X-16—PLTFS MOTION FOR RELIEF FROM JUDGMENT AND FOR A NEW TRIAL.

4-12-82—X-18—DEFTS' MOTION re: costs, together with Affidavit of Eric R. Miller.

8-13-82—X-22—ORDER (Heaney, Alsop & Larson, J) that Plaintiffs motion to amend findings, for relief from judgment, for a new trial and a hearing on the calculation of attorneys' fees and defendants' motion to amend Court's judgment insofar as it taxes 20 percent of plaintiffs' costs against the MCCFA and MSBCC are all denied. (Dated 8-12-82).

10-1-82—X-24—PLTF'S NOTICE OF APPEAL TO THE U. S. SUPREME COURT FROM THE JUDGMENT ENTERED ON 3-31-82 AND THE FINDINGS OF FACT ENTERED ON 11-16-81.

Mailed certified copy of Notice, along with two certified copies of the docket entries to Alexander Stevas, Clerk, U. S. Supreme Court, 1 First Street N. E., Washington, D. C. 20543. Mailed copy of Notice to Counsel.

10-5-82—X-25—DEFT., MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES, NOTICE OF APPEAL TO THE U. S. SUPREME COURT FROM ORDER FOR JUDGMENT, PARAGRAPHS 1, 2 and 3, ENTERED ON 3-31-82.

10-12-82—X-26—MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, THE MINNESOTA EDUCATION ASSOCIATION AND THE NATIONAL EDUCATIONAL ASSOCIATION'S NOTICE OF APPEAL FROM ORDER OF 3-31-82 AND 8-13-82.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
(TITLE OMITTED IN PRINTING)

PLAINTIFFS' AMENDED COMPLAINT

[6] Plaintiffs are residents of Minnesota and citizens of the United States. Specifically, Plaintiffs

(D) do not desire to be represented either individually or collectively by defendants Association, MEA, IMPACE, OR NEA with respect to

(1) collective bargaining with the Board;

(2) the expression, communications, or exchange of views, complaints, opinions, or concerns to or with the Board or its agents in respect of any matters

(a) concerning personnel, student affairs, curricula, facilities, or finances in or of the community colleges subject to the jurisdiction of the Board [hereinafter referred to collectively as "college policy"]; or

(b) otherwise relating to the services provided to the public by the Board;

(3) the support of political campaigns of candidates for public office, in the State of Minnesota or elsewhere;

(4) propaganda, agitation, or lobbying on a local, state or nationwide basis [hereinafter referred to collectively as "union activism"] intended to or which in its operation and effect may

(a) influence the general public to vote; legislative bodies to enact laws; or executive or administrative officials to exercise their authority to the legal, economic, or other special advantage of any individual or group; or

(b) otherwise advance any philosophical, scientific, political, economic, or social doctrine, concept, policy, or program [hereinafter referred to collectively as "ideological causes"];

(5) The provision of medical, legal, insurance credit, recreational, educational, economic, social, or other services or activities [hereinafter referred to collectively as socio-economic services"]; or

(6) any other activity.

[19] As Plaintiffs' statutorily imposed exclusive representative, the Association, by and through defendants Norman, Durham, Bell, Minke, Chesebrough and Holman [hereinafter referred to collectively as "Local Officers"], has claimed and exercised the purported statutory rights, powers, and privileges [hereinafter referred to collectively as "authority"], binding upon Plaintiffs,

(A) under color of MINNESOTA STATUTES §§179.63 [15-18], 179.65[2, 4, 7], 179.69[1-2, 4], 179.70[1, 6], 179.72 [12], and 179.74[4], to meet and negotiate and meet and confer with the Board and defendants Members, Chancellor, and Presidents [hereinafter referred to collectively as "College Officials"] regarding terms, conditions, grievances, and arbitrable disputes arising out of Plaintiffs' employment [hereinafter referred to collectively as "employment matters"];

(D) under color of MINNESOTA STATUTES Chapter 179, to discuss, express, communicate, and exchange grievances, complaints, opinions, views and concerns [hereinafter referred to collectively as "employee opinion"] to or with the Board and defendant College Officials, and their agents, on behalf of Plaintiffs in respect of

(1) college policy; and

(2) other matters relating to the services provided to the public by the Board.

[20] As a result of the certification of the Association as Plaintiffs' exclusive representative, the Board and defendant College Officials, and their agents, have undertaken to satisfy by their official action the purported statutory duties of the Board and said Defendants

(A) under color of MINNESOTA STATUTES §§179.63 [15-18], 179.66[2], 179.68[1, 2(5, 11)], 179.69[1-2], and 179.74[4], to meet and negotiate and meet and confer with the Association regarding employment and other matters binding upon Plaintiffs;

(B) under color of MINNESOTA STATUTES §§179.66 [7] and 179.68[2(1, 5-6, 9)], neither to meet and negotiate nor meet and confer with Plaintiffs either individually or in groups separate from the Association;

(C) under color of MINNESOTA STATUTES §§179.68 [1, 2(6, 9)], 179.69[1, 3-6], 179.70[1-4], 179.72[6-7, 12], and 179.74[4-5], to negotiate, execute, and implement purported contracts with the Association regarding employment and other matters binding upon Plaintiffs;

(E) under color of MINNESOTA STATUTES Chapter 179 generally, to manage the affairs of the community colleges within its jurisdiction subject to such control or influence as the Association may exercise under color of the purported statutory authority enumerated in ¶19.

The Board and defendant College Officials, and their agents, will continue to undertake to satisfy by their official action these and other purported statutory duties of the Board and said Defendants arising under color of MINNESOTA STATUTES Chapter 179.

[21] On April 17, 1973, under color of MINNESOTA STATUTES, §§179.69, 179.70, and 179.74, the Association and the Board, by and through defendants Chancellor, Durham and Chesebrough inter alia, executed a document (the purported contract) which recites employment and other matters between Plaintiffs and the Board, and specifically provides that the Board

(A) shall recognize the Association as Plaintiffs' exclusive representative (Article I);

(B) shall neither meet and negotiate nor meet and confer on employment matters with any employee or group of employees except through the Association as exclusive representative (Article I);

(C) shall require defendant Presidents or their designees to meet with an Association committee to exchange views on matters of college policy in their respective colleges (Article VI, §5);

(D) shall meet and confer with an Association committee on educational matters of statewide significance (Article VI, §6);

(F) shall be bound by the provisions of the purported contract through June 30, 1975, and from year to year thereafter (Article XXVII).

[34] **As a result of the acts and conduct of the Board and of defendants Association, Local Officers, College Officials, Ziegler, Bjornson, and Director done under color of the statutory scheme of exclusive representation set out in ¶17 and described in ¶¶19-20, Plaintiffs have been and will be required, as a condition of continued public employment, to suffer**

(A) denial of any effective means, either as individuals or as groups separate from the Association, to meet and

negotiate or meet and confer with or otherwise petition the Board or defendant College Officials with respect to employee opinion on college policy, employment matters, and other issues;

(B) relegation of employment and other matters to the exclusive jurisdiction and control of the Association, a private organization.

(1) delegated quasi-governmental authority undefined by reference to any objective or rational standards; and

(2) subject neither to supervision nor to review by competent legislative, executive, administrative, or judicial officers or tribunals;

(C) compulsory wage check-offs levied as described in ¶38 in financial support of the purported services of the Association in collective bargaining with the Board and defendant College Officials;

(D) control of employment and other matters by collective bargaining between the Association and the Board and defendant College Officials;

(E) compelled association with the ideological causes, practices, and activities of defendants Associations, MEA, IMPACE, NEA, and Officers.

(1) by relegation of employment and other matters to the exclusive jurisdiction and control of the Association; and

(2) by check-off and expenditure of "fair-share" fees;

(F) as a consequence of their choice not to retain formal membership in the Association, an invidiously discriminatory denial, by defendants Association and Local Officers, of any effective means procedurally or substantively to formulate, pass upon, or administer the particular union policies embodied in or implemented through collective bargaining with the Board;

(G) defendants Association and Local Officers as their spokesmen with respect to matters concerning

(1) college policy;

(2) public education in community colleges in the State of Minnesota; and

(3) other issues;

(H) the coercive and intimidatory demands of the Association that Plaintiffs

(1) acknowledge defendants Association, MEA, IMPACE, NEA, and Officers as the source and cause of those benefits which accrue to Plaintiffs from public employment with the Board;

(2) support the activities of defendants Association, MEA, IMPACE, NEA, and Officers directed towards their control of the qualifications for entrance into and the privilege of remaining in the profession of teaching, in the State of Minnesota and elsewhere;

(3) conform their attitudes, convictions, and beliefs on ideological causes and professional issues to the policies and goals advanced by defendants Association, MEA, IMPACE, NEA, and Officers; and

(4) otherwise give loyalty, allegiance, and support to defendants Association, MEA, IMPACE, NEA, and Officers, in derogation of

(a) their duties as public employees to the Board, the educational community, and the public generally;

(b) their responsibilities as citizens of the State of Minnesota; and

(c) their own self-interest as they perceive it; and

(I) the necessary deleterious results and concomitants of the requirements enumerated in ¶34(A-H) as enforced by Defendants against all "fair share" payers under color of MINNESOTA STATUTES Chapter 179.

[35] These and other requirements enforced and to be enforced under color of the challenged statutory provisions, together with the plain terms of those provisions and the political nature of compulsory collective bargaining in public employment, demonstrate that said system of exclusive representation

(A) on its face, in its essential inevitable effect, and in the deliberate and calculated purpose of the Minnesota Legislature; and

(B) as applied intentionally and purposefully against Plaintiffs

(1) by the Board and by defendants Association, Local Officers, College Officials, Ziegler, Bjornson, and Director acting pursuant to the statutory mandate of that Legislature; and

(2) by defendants Association, MEA, IMPACE and NEA acting together in concern, by and through defendant Officers;

(a) with knowledge and under color of

(i) the challenged statutory provisions described in ¶17; and

(ii) the purported contract described in ¶21; and

(b) pursuant to the agreements and arrangements among them described in ¶22.

does and will constitute and cause, and has caused, abridgements, disparagements, denials, and deprivations of rights, powers, privileges, and immunities [hereinafter referred to collectively as "freedoms"] and secured for Plaintiffs by the First, Ninth, Tenth, Thirteenth, and Fourteenth Amendments to the United States Constitution, and by Title 42, UNITED STATES CODE §1983.

[36] Specifically, because said system of exclusive representation

(A) is intended, necessarily operates, and has been and will be applied by defendants Association, MEA, IMPACE, NEA, Officers, College Officials, Ziegler, Bjornson and Director to coerce, restrain, chill, and discourage Plaintiffs in the exercise and enjoyment of their constitutionally guaranteed freedoms;

(B) authorizes public officials and private parties to exercise excessively broad, vague, and unreviewable administrative and quasi-governmental authority, and has been and will be so applied by defendants Association, Local Officers, College Officials, and Director;

(C) is not necessary for the attainment of any compelling public interest; and

(D) bears no substantial rational relationship to any legitimate State aim; said system of exclusive representation:

First, abridges and deprives Plaintiffs of their fundamental freedom of self-government, in violation of the First, Ninth, Tenth, and Fourteenth Amendments;

Second, abridges and deprives Plaintiffs of their fundamental freedoms of speech, thought, conscience, assembly, petition, and association, in violation of the First and Fourteenth Amendments;

Third, denies, disparages, and deprives Plaintiffs of their fundamental freedoms of contract and employment, in violation of the Ninth, Tenth, Thirteenth and Fourteenth Amendments;

Fourth, constitutes involuntary servitude imposed other than as a punishment for crime, in violation of the Thirteenth Amendment;

Fifth, deprives Plaintiffs of liberty and property without procedural or substantive due process of law, in violation of the Fourteenth Amendment; and

Sixth, denies Plaintiffs the equal protection of the laws, in violation of the Fourteenth Amendment.

In applying said system of exclusive representation against Plaintiffs, defendants Association, MEA, IMPACE, NEA, Officers, College Officials, Ziegler, Bjornson, and Director have violated and will violate Title 42, UNITED STATES CODE §1983.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIVIL ACTION NO. 4-74-659

LEON W. KNIGHT, et al.,

Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, et al.,

Defendants.

SEPARATE ANSWER OF DEFENDANTS CRIPPEN, MCVAY SONTOROVICH, PLUNKETT, NYCKLEMOE, BRUCE, HELLAND, HELLING, LORENZ AND DENISON

Defendants Crippen, McVay, Sontorovich, Plunkett, Nycklemoe, Bruce, Helland, Helling, Lorenz and Denison, for their separate answer to the amended complaint herein, admit, deny and allege as follows:

1. Specifically deny that this action is properly brought pursuant to the statutes set forth in paragraphs 1, 2, 3 and 4 of plaintiffs' amended complaint.

2. Deny that this is a proper action for a three-judge court pursuant to Title 28 U.S.C. §§ 2281 and 2294, as alleged in paragraph 5 of plaintiffs' amended complaint.

3. Deny that plaintiffs Florin and Patin are presently faculty members at Normandale Community College; admit that all other plaintiffs are faculty members at North Hennepin, Normandale and Anoka-Ramsey Community Colleges; admit that the Minnesota Community College Faculty Association (hereinafter "Association") is the certified exclusive representative of faculty members employed by the Minnesota State Board for Community Colleges (hereinafter "Board"); allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 6 of plaintiffs' amended complaint.

4. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 7, 8, 9, 10, 19, 22, 23, 24, 25, 26, 28, 29, 30, 31, 34, 35, 36, 38, 39, 40, 42, 43, 44, 49, 50, 51 and 52 of plaintiffs' amended complaint.

5. Admit that defendant Association is an "employee organization" which has been certified as the exclusive representative of faculty members employed by the Board; admit that a contract reciting terms and conditions of employment between the Board and defendant Association was executed on April 17, 1973; allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 11 of plaintiffs' amended complaint.

6. Deny that defendants Crippen, McVay, Sontorovich, Plunkett, Nycklemoe and Bruce are responsible for alleged acts and conduct of the Board; admit the remaining allega-

tions contained in paragraph 12 of plaintiffs' amended complaint.

7. Deny that defendant Board Members are responsible for alleged acts of the Board; deny that the Board is directly responsible for the check-off of any fair share fees; admit all other allegations contained in paragraph 13 of plaintiffs' amended complaint.

8. Allege that Ronald H. Denison is on leave of absence from the presidency of Anoka-Ramsey Community College; deny that the "presidents" meet and confer with the Association on a statewide basis or meet and negotiate with the defendant Association; allege that the Presidents are agents of the Board for only limited purposes; admit the remainng allegations contained in paragraph 14 of plaintiffs' amended complaint.

9. Admit that defendant Ziegler is the Commissioner of Finance for the State of Minnesota and that defendant Bjornson was the Treasurer of the State of Minnesota; allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 15 of plaintiffs' amended complaint.

10. Admit that defendant Swanson is the Director of the Minnesota Bureau of Mediation Services; admit that he has responsibility for the operation of the Bureau of Mediation Services; admit that he is the successor in office to Vern E. Buck; admit that the Minnesota Community College Faculty Association has been certified as the exclusive representative of faculty members employed by the Minnesota State Board for Community Colleges; admit that the Director's duties are generally set forth in Minn. Stat. §§ 179.61-179.76 (1974); allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allega-

tions contained in paragraph 16 of plaintiffs' amended complaint.

11. To the extent that paragraphs 17 and 18 of plaintiffs' amended complaint attempt to recite the contents of the Minnesota Public Employment Labor Relations Act, these separate answering defendants refer this Court to the official text thereof.

12. Deny that the Board and College Officials have checked off any fair share fees; admit that the Board has undertaken to satisfy its official duties under Minn. Stat. ch. 179 (1974); allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 20 of plaintiff's amended complaint.

13. Deny that the Board contracted not to meet with any other employee or group of employers; allege that the Board agreed not to meet and negotiate or meet and confer relative to terms and conditions of employment with any employee or group of employees covered by the contract except through defendant Association; admit all other allegations contained in paragraph 21 of plaintiffs' amended complaint.

14. Admit that during academic year 1973-1974 defendant Association required the check-off of fair share fees totaling $94.48 per faculty member; allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 27 of plaintiffs' amended complaint.

15. Admit that the Board has not provided plaintiffs with an accounting of defendant Association's uses of fair share fees; allege that defendant Association has not provided the Board with an accounting of its uses of fair share fees; allege that they are without knowledge or information sufficient to

form a belief as to the truth of the remaining allegations contained in paragraph 32 of plaintiffs' amended complaint.

16. Deny that Board Members knew, should have known, presently know or should know the substance, purpose or result of acts and conduct of other defendants specified in paragraph 45 of plaintiffs' amended complaint; allege they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 45 of plaintiff's amended complaint.

17. Deny that the Board, Board Members, Chancellor or Presidents checked-off or check-off any fair share fees from plaintiffs' wages or had the knowledge described in paragraph 46 of plaintiffs' amended complaint; allege that they are without knowledge or information sufficient to form a belief as to the truth of all other allegations contained in paragraph 46 of plaintiffs' amended complaint.

18. Deny the allegations contained in paragraphs 47 and 48 of plaintiffs' amended complaint.

19. Except as expressly admitted, denied or otherwise qualified hereinabove, deny each and every allegation, matter, fact and thing contained in plaintiffs' amended complaint.

SEPARATE DEFENSES

20. Allege that this Court lacks jurisdiction over the subject matter.

21. Allege that if this Court determines that it has jurisdiction, it should abstain from hearing this matter.

22. Allege that the amended complaint fails to state a claim against these answering defendants upon which relief may be granted.

23. Allege that these answering defendants are not proper parties.

24. Allege that Minn. Stat. ch. 179 (1974) or any part thereof is not violative of the United States Constitution either on its face or as applied by defendant College Officials, Board or Board Members.

WHEREFORE, these answering defendants request that plaintiffs' amended complaint be dismissed and that these defendants be granted their costs and disbursements.

Dated: February 10, 1975.

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Denison

UNTED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. Action No. 4-74-659

LEON W. KNIGHT, et al.,

Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, et al.,

Defendants.

ANSWER OF DEFENDANTS MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, INDEPENDENT MINNESOTA POLITICAL ACTION COMMITTEE FOR EDUCATION, NATIONAL EDUCATION ASSOCIATION, JAMES A. NORMAN, JAMES K. DURHAM, ROBERT BELL, CALVIN MINKE, RALPH S. CHESEBROUGH, DONALD HOLMAN, WILLIAM M. MONDALE, JAMES ROSASCO, ALFRED F. PROVO, ALBERT L. GALLOP, FULTON B. KLINKERFUES, JANET R. MORGAN, JOHN W. SCHUTT, JAMES A. HARRIS, HELEN D. WISE, CATHARINE O'C. BARRETT, TERRY E. HERNDON, AND SAM M. LAMBERT

Defendants, Minnesota Community College Faculty Association, Minnesota Education Association, Independent Minnesota Political Action Committee for Education, National Education Association, James A. Norman, James K. Durham, Robert Bell, Calvin Minke, Ralph S. Chesebrough, Donald Holman, William M. Mondale, James Rosasco, Alfred F. Provo,

Albert L. Gallop, Fulton B. Klinkerfues, Janet R. Morgan, John W. Schutt, James A. Harris, Helen D. Wise, Catharine O'C. Barrett, Terry E. Herndon, and Sam M. Lambert, for their separate answer to the amended complaint herein, admit, deny and allege as follows:

FIRST DEFENSE

1. Deny that this action is properly brought pursuant to the statutes relied upon in Paragraphs 1, 2, 3 and 4 of the amended Complaint.

2. Deny that this is a proper action for a three-judge court pursuant to Title 28 U.S.C. §2281 and §2294 as alleged in Paragraph 5 of the amended complaint.

3. Admit that the Minnesota Community College Faculty Association ("MCCFA") is the certified exclusive representative of faculty members employed by the Minnesota State Board for Community Colleges ("Board") but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 6 of the amended complaint.

4. Admit that the individuals listed in Paragraph 7 of the amended complaint were or are officers or representatives of defendants, MCCFA, National Education Association ("NEA"), Minnesota Education Association ("MEA") and Independent Minnesota Political Action Committee for Education ("IMPACE").

5. Admit that the NEA is an unincorporated association with its principal office located at 1201 16th Street, N.W., Washington, D.C., and a local office at 41 Sherburne Avenue, St. Paul, Minnesota; admit that the NEA is not an exclusive representative under Minnesota Statutes §179.67 and that some of the fair share fees deducted under Minnesota Statutes §179.65 Subd. 2 are furnished to the NEA, but deny the remaining allegations of Paragraph 8 of the amended complaint.

6. Admit that the MEA is a non-profit corporation under the laws of the State of Minnesota with its principal office located at 41 Sherburne Avenue, St. Paul, Minnesota; admit that the MEA is not an exclusive representative under Minnesota Statutes §179.67 and that some of the fair share fees deducted under Minnesota Statutes §179.65 Subd. 2 are furnished to the MEA, but deny the remaining allegations of Paragraph 9 of the amended complaint.

7. Admit that IMPACE is an unincorporated association with its principal office located at 41 Sherburne Avenue, St. Paul, Minnesota; admit that IMPACE is not an exclusive representative under Minnesota Statutes §179.67 but deny the remaining allegations of Paragraph 10 of the amended complaint.

8. Admit that the MCCFA is an unincorporated association with its principal office loated at 41 Sherburne Avenue, St. Paul, Minnesota and it is an employee organization which has been certified as the exclusive representative of the plaintiffs under Minnesota Statutes §179.67; admit that the MCCFA has entered into a contract with the Minnesota State Board for Community Colleges ("Board") pursuant to Minnesota Statutes §179.70; admit that the MCCFA has collected a fair share fee pursuant to Minnesota Statute §179.65 Subd. 2 but deny the remaining allegations of Paragraph 11 of the amended complaint.

9. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained within Paragraph 12 of the amended complaint.

10. Admit that the Board is established under Minnesota Statutes §136 and that the Board is a public employer under Minnesota Statutes §179.63 Subd. 4 but deny the remainder of plaintiffs' allegations within Paragraph 13 of the amended

complaint which attempt to interpret the statutes and allege that the statutes speak for themselves.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 14 of the amended complaint.

12. Admit that defendant Ziegler is the Commissioner of Finance for the State of Minnesota and that defendant Bjornson was the Treasurer of the State of Minnesota, but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 15 of the amended complaint.

13. Admit that Charles A. Swanson is the Director of the Bureau of Mediation Services and that the MCCFA is the certified exclusive representative for faculty members within the community college system and further allege that Minnesota Statutes §179.02, 179.67 and 179.71 speak for themselves.

14. To the extent that Paragraphs 17 and 18 of the amended complaint attempt to recite or interpret the referenced sections of the Minnesota Public Employment Labor Relations Act (PELRA), defendants allege the statutes speak for themselves.

15. Admit that the MCCFA and its officers have exercised the powers vested in them pursuant to PELRA; except as hereinbefore admitted, defendants deny the allegations of Paragraph 19 of the amended complaint.

16. Admit that the Board, defendant college officials and their agents have undertaken to fulfill various of their statutory duties under PELRA but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 20 of the amended complaint.

17. Admit that the MCCFA and the Board entered into a contract pursuant to Minnesota Statutes §179.70 but deny the interpretations attributed to the provisions of the contract and allege that the contract speaks for itself to the extent referenced in Paragraph 21 of the amended complaint.

18. Deny the allegations of Paragraph 22 of the amended complaint.

19. Admit that the MCCFA has requested a fair share fee check-off of $94.48 for the 1973-74 school year and $118.13 for the 1974-75 school year and have notified the plaintiffs and the Board of such requests; except as hereinbefore admitted, defendants deny the allegations of Paragraph 23 of the amended complaint.

20. Admit that the requests for fair share fee check-offs as admitted in Paragraph 19 of the answer were made with the anticipation that the Board would act pursuant to its statutory responsibilities; except as hereinbefore admitted, defendants deny the allegations of Paragraph 24 of the amended complaint.

21. Deny the allegations of Paragraphs 25, 26 and 27 of the amended complaint.

22. Admit the fair share deductions for the academic years 1973-74 and 1974-75 roughly equal respectively 94% and 97% of the annual dues charged to members of the MCCFA; except as hereinabove admitted defendants deny the allegations of Paragraph 28 of the amended complaint.

23. Deny the allegations of Paragraphs 29 and 30 of the amended complaint.

24. Admit that certain of the plaintiffs have protested the payment of their fair share fees and have requested an accounting; except as hereinbefore admitted, defendants are without knowledge or information sufficient to form a belief

as to the truth of the remaining allegations of Paragraph 31 of the amended complaint.

25. Admit that the MCCFA has not provided an accounting to the plaintiffs but are without information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 32 of the amended complaint.

26. Defendants reallege Paragraphs 1 through 27 of their answer in response to the allegations of Paragraph 33 of the amended complaint.

27. Defendants deny the allegations of Paragraphs 34, 35, and 36 of the amended complaint.

28. Defendants reallege Paragraphs 1 through 27 of their answer in response to the allegations of Paragraph 37 of the amended complaint.

29. Defendants deny the allegations of Paragraphs 38, 39 and 40 of the amended complaint.

30. Defendants reallege Paragraphs 1 through 27 of their answer in response to the allegations of Paragraph 41 of this amended complaint.

31. Deny the allegations of Paragraphs 42 through 52 of the amended complaint.

32. Except as expressly admitted or denied hereinabove these defendants deny each and every allegation contained in plaintiffs' amended complaint.

SECOND DEFENSE

The court lacks jurisdiction over the subject matter.

THIRD DEFENSE

The amended complaint fails to state a cause of action upon which relief may be granted as to these defendants.

FOURTH DEFENSE

Plaintiffs' claims are barred by the applicable statutes of limitation.

FIFTH DEFENSE

The Public Employment Labor Relations Act is not violative of the United States Constitution on its face or as applied by these defendants.

SIXTH DEFENSE

Plaintiffs have failed to properly exhaust their administrative remedies.

SEVENTH DEFENSE

If this court determines that it has jurisdiction, it should abstain from hearing this matter.

WHEREFORE, these defendants request that plaintiffs' amended complaint be dismissed and that these defendants be granted their costs and disbursements.

Dated: February 6, 1976

OPPENHEIMER, WOLFF, FOSTER, SHEPARD AND DONNELLY

By /s/ Eric R. Miller

By /s/ Keith E. Goodwin

Attorneys for Defendants Minnesota Community College Faculty Association, Minnesota Education Association, Independent Minnesota Political Action Committee for Education, National Education Association, James A. Norman, James K. Durham, Robert Bell, Calvin Minke, Ralph S. Chesebrough, Donald Holman, William M. Mondale, James Rosasco, Alfred F. Provo,

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[Pl. Ex. 1, R. 92] EMPLOYMENT CONTRACT
1979 - 81
Between
MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES
and
MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION

ARTICLE I
RECOGNITION

The Employer recognizes the Association as the exclusive bargaining representative for all instructors, counselors, and librarians who work more than 14 hours per week or more than 35% of a normal work week and more than 100 work days per calendar year; excluding presidents, vice presidents, assistants to presidents, administrative assistants, deans, assistant deans, associate deans, directors, assistant directors, and all classified personnel. In accordance with the Bureau of Mediation Services Case No. 69-PR-422, the term "employ-

ee," when used hereinafter in the Contract shall refer to all employees of the designated bargaining unit, and reference shall include both male and female employees.

The Employer will not during the life of this Contract meet and negotiate or meet and confer relative to terms and conditions of employment with any employee or group of employees who are covered by this Contract except through the exclusive bargaining representative.

If titles or positions are created during the life of this Contract that are not listed above, the parties will meet and attempt to agree on the inclusion or exclusion of the new title or position. If the parties cannot agree, the question will be submitted to the Director of the Bureau of Mediation Services for a determination of the inclusion or exclusion of such title.

ARTICLE V

MANAGEMENT RIGHTS

It is recognized that except as expressly stated herein the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the colleges in all of their various aspects, including but not limited to, the educational policies of the colleges; the right to direct and assign employees; to schedule working hours; to determine whether goods or services should be made or purchased; to make and enforce reasonable rules and regulations affecting terms and conditions of employment that are uniformly applied and enforced in accordance with the provisions of the rules or regulations. Any term or condition of employment not specifically established by this Contract shall remain solely within the discretion of the Employer to modify, establish or eliminate.

ARTICLE VI
ASSOCIATION RIGHTS

Section 5. *Association Local Committees.* The Association shall establish from one to six committees. Membership on each committee shall not exceed six. The number of committees may be limited to three at the College President's request or to a lesser number with Local Association agreement. Committees will be assigned responsibility for one or more of the following topic areas: Personnel, Student Affairs, Curriculum, Facilities, Fiscal Matters, and General Matters. The exchange of views process is recognized as being a significant and necessary part of the local campus operation.

Section 6. *Association State Committee.* The State Association shall establish a committee of no more than eight members to meet and confer with the Minnesota State Community College Board for discussion and mutual exchange of ideas regarding statewide matters which are considered significant by the State Association or the Employer. The Employer shall provide the facilities and set the time for such conferences to take place, and such conferences shall be held at least three times a year. Agenda will be prepared and distributed one week in advance by the Board President or her/his designee and will include all items submitted by the State Association. The agenda shall also include all items submitted by the Board President.

Section 7. ***Access to Information.*** **Upon request, the Employer or the employer's designees agree to provide the Association at state and local levels information available to it concerning the professional staffing and financial resources of the Minnesota Community Colleges, including routine reports, registry of professional personnel, tentative budgetary requirements and allocations, agendas, and minutes of Board**

meetings, names and addresses and position on the salary schedule of all employees in the bargaining unit, and such other information requested by the Association in contract matters or in the processing of a grievance.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-74 Civ. 659

LEON W. KNIGHT, et al.,

Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, et al.,

Defendants.

STIPULATION

The parties to the above-referenced case, through counsel, hereby stipulate that the facts hereinafter set forth are true; that all documents appended hereto are true and correct copies of their originals; and that the following statement of facts, together with all documents identified herein and appended hereto, may be relied upon by the Court in the determination of the legal issues raised by the pleadings. This Stipulation is made by the parties to this proceeding upon and subject to the conditions that:

a) all facts recited herein are stipulated by and between the parties for the purposes of this proceeding only and nothing contained herein shall constitute an admission by any party for any other purpose, action or proceeding;

b) this stipulation to the truth and accuracy of the facts included herein and the documents appended hereto, does not constitute an admission by either party with respect to the relevance or materiality of any such fact or document.

IT IS HEREBY STIPULATED among the parties as follows:

1. The State of Minnesota has a legitimate interest in promoting orderly and constructive relationships between public employers and employees.

2. Unresolved disputes between public employers and their employees are detrimental to the public interest as well as to the interests of the involved parties.

3. The goal of "labor peace"* is as important in the relationship between a public employer and its employees as it is between a private employer and its employees.

4. A statutory system which permits employees in a unit to be represented by an exclusive representative results in the avoidance of confusion, conflicting demands, and dissension that would result from more than one representative claiming to represent all the employees in said employee unit.

5. The State of Minnesota has a legitimate interest in maintaining "labor peace" by entering into agreements with an exclusive representative for each employee unit, which agreements are not subject to direct challenge by rival employee organizations claiming to represent the same employees in each unit.

6. The State of Minnesota has a legitimate interest in the financial stability of an exclusive representative of its em-

* "Labor peace" as used in this stipulation and at all other places herein is defined as a stable relationship between employer and employees which is characterized by the absence of work stoppages, work slowdowns, or unresolved disputes, and by the efficient continuation of public business and services.

ployees to the extent that that exclusive representative has sufficient financial resources to perform those statutory duties pursant to the Public Employment Labor Relations Act that are consistent with the Minnesota and United States Constitutions.

7. The State of Minnesota has determined that enactment of the Public Employment Labor Relations Act is the means by which it can best deal with its employees in a fair, efficient, and peaceful fashion.

8. The defendant SBCC has never denied any of its employees the opportunity to communicate to board members views on any subject related to matters affecting the community colleges.

Dated December 5, 1979.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
(TITLE OMITTED IN PRINTING)

STIPULATIONS BETWEEN
PLAINTIFFS AND DEFENDANT STATE OFFICIALS

16. The collective bargaining agreement between the Defendant MCCFA and the Defendant SBCC covering the years 1977-79, which, for all purposes material here, is identical to the contract covering the years 1975-77, provides in pertinent part as follows:

ARTICLE I
RECOGNITION

The Employer recognizes the Association as the exclusive bargaining representative for all . . . employees of the designated bargaining unit, and reference shall include both male and female employees.

The Employer will not during the life of this Contract meet and negotiate or meet and confer relative to terms and conditions of employment with any employee or group

of employees who are covered by this Contract except through the exclusive bargaining representative . . . .

17. Article VI, Section 6 of the collective bargaining agreement between Defendant SBCC and Defendant MCCFA has provided as follows:

> Section 6. *Association State Committee.* The State Association shall establish a committee of no more than eight members to meet and confer with the Minnesota State Community College Board for discussion and mutual exchange of ideas regarding statewide matters which are considered significant by the State Association or the Employer. The Employer shall provide the facilities and set the time for such conferences to take place, and such conferences shall be held at least three times a year. Agenda will be prepared and distributed one week in advance by the Board President or her/his designee and will include all items submitted by the State Association. The agenda shall also include all items submitted by the Board President.

18. Defendant MCCFA has, pursuant to Minn. Stat. § 179.65, subd. 3, and pursuant to the portion of the collective bargaining agreement referred to in paragraphs 16 and 17 above, met and conferred with Defendant SBCC. These meetings have, at all times material, occurred approximately every two months. These meetings have covered the following subjects, among others:

a) interpretation of the Professional Staff Contract;

b) evaluation of administrators of the various colleges;

c) the state plan for vocational education as it applies to faculty teaching load;

d) student rights;

e) planning of new facilities;

f) academic accreditation of the colleges operated by Defendant SBCC;

g) merger of higher education systems in Minnesota;

h) student activity fees;

i) due process for students;

j) selection of college Presidents.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
(TITLE OMITTED IN PRINTING)

DEFENDANT LABOR ORGANIZATIONS' AGREED UPON STIPULATIONS OF FACT

1065. The process of "meet and negotiate" and "meet and confer", as defined in Minn. Stat. § 179.63 deals, in part, with the question of compensation for community-college teachers.

1066. The process of "meet and negotiate" and "meet and confer", as defined in Minn. Stat. § 179.63 deals, in part, with the question of job security for community-college teachers.

1067. The process of "meet and negotiate" and "meet and confer", as defined in Minn. Stat. § 179.63 deals, in part, with the question of educational services in the community colleges.

1068. The process of "meet and negotiate" and "meet and confer", as defined in Minn. Stat. § 179.63 deals, in part, with the question of professional standards for community-college teachers.

1069. The process of "meet and negotiate" and "meet and confer", as defined in Minn. Stat. § 179.63 deals, in part, with the question of working conditions for community-college teachers.

1070. Improving the effectiveness of the process of "meet and negotiate" and "meet and confer", as defined in Minn. Stat. § 179.63, is related to that process.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
(TITLE OMITTED IN PRINTING)

PLAINTIFFS COMBINED AND INDEXED
REVISED STIPULATIONS
AND SUPPLEMENTARY EXHIBITS

1705. Since 27 April 1973, participation on faculty-committees that "meet and confer" with the community-college Board and its agents, as "meet and confer" is defined in Minn. Stat. § 179.63, subd. 15, has been limited to members of MCCFA as a matter of MCCFA's policy and practice.

1706. The original and successor agreements between MCCFA and the community-college Board provide, in implementation of Minn. Stat. § 179.66, subd. 7, that the Board and its agents will not "meet and confer", as "meet and confer" is defined in Minn. Stat. § 179.63, subd. 15, with any faculty-member covered by the agreements, including plaintiffs, except through MCCFA.

1707. MCCFA's position under Minn. Stat. § 179.66, subd. 7, is that, with respect to any terms and conditions of employment covered by the collective-bargaining agreement between MCCFA and the community-college Board, the Board and its agents may not "meet and confer", as "meet and confer" is defined in Minn. Stat. § 179.63, subd. 15, with any faculty-member (including plaintiffs) who is not a designated representative of MCCFA.

1711a. Chancellor Helland testified under oath as follows (Vol. 2, pp. 42-43):

Q. So that if a college President heard from the Faculty Association expressing point of view A, he would be precluded

from the contract by saying, "I doubt that that's what the majority of our faculty really think and and I'm going to take a poll or do a summary or a survey to find out what they really think."

A. What they really think isn't his concern; what the Association says they think is his concern.

Q. And that's because of the contract.

A. Right.

Q. In Exhibit F to the—

A. Excuse me. I wonder if it's entirely because of the contract or whether it's because of PELRA and the designation of units. Maybe that's a small differentiation.

Q. Alright, I accept that addition to your answer.

1711b. Chancellor Helland testified under oath as follows (Vol. 1, pp. 45-47);

Q. Well, during the first period, that is, the period of informal recognition, was the individual free to discuss anything he wanted to with the administrator of his college, regardless of what the administrator's reaction might be?

A. Surely.

Q. And then after the action formally recognizing, in a limited way, the Faculty Association on May 15, 1969, and up to the decision in 1971 by Mr. Buck, was an individual free to discuss anything he wanted with the administrator?

A. Surely.

Q. And then after Mr. Buck made his decision in January of '71, was an individual free to discuss anything he wanted?

A. Yes.

Q. Has that been also true since the adoption of the contract in April of '73?

A. Well, I think that, technically, the person has been free to do that and the administrator's been free to do that, but I

think that practically—many such situations have disappeared because of the fear on the part of the administrator that they would be meeting and conferring or negotiating with someone other than the exclusive representative, and the problem of defining what's meeting and conferring and what's negotiation, I think has been the basic problem. There's much less tenseness on that issue now than after the signing of the first contract.

Clearly the administrator, under our contract, can't take the opinions of any individual faculty member as the opinion of the faculty. Only the exclusive representative can state what the opinion of the faculty is.

Q. Can he take the opinion of an individual faculty member into account in making his decision even though it is at variance with the position of the Faculty Association?

A. I'm sure that happens, but the position of the Faculty Association—or the position of the faculty is the Faculty Association's.

TRIAL TESTIMONY OF
PHILIP C. HELLAND
pp. 398-400
408-428
431-443

• • •

[R. 398] Q. Now, I would like to direct your attention to the pre 1973, and specifically the pre September 1973 faculty administrative structure on each of these campuses. I wonder if you could describe what the structural relationship was on those campuses?

A. I don't think I can do that without considerable [R. 399] investigation. The structure was different on each cam-

pus. Prior to that time there was no set patterns for relationships on campuses. That was determined at the campus.

Q. Did the faculty administrative structure become more standardized after—or as of 1973?

A. I'm not sure what you mean by "structure", but the communications between them became more standardized.

Q. I see. Do you have any knowledge at all of what the communication channels were that were available to teachers and administrators prior to September of 1973?

A. Well, I am only speaking from general memory and general knowledge, but I think the range was all the way from very authoritariate campuses where decisions were made by presidents with very little communication, to rather democratic campuses where there was considerable involvement, and the whole gamut existed in between those.

Q. I see. What structure for communications occurred in 1973, can you describe that?

A. I assume you are speaking of the first contract?

Q. Well, yes, if the change in structure was generated by the first master contract, yes, I am.

A. The master contract provided that communication would take place through six specified committees with whom the administration of the college would meet and confer, [R. 400] exchange all the views.

Q. Now, is the contract that you are referring to a master collective bargaining agreement?

A. Yes, the contract between the State Board and the Faculty Association.

Q. And that contract had application on all of the campuses in the community college system, is that correct?

A. That's right.

* * *

* * *

[R. 408] Q. Now, then, getting back to the process of negotiations for a minute, I wonder if you could tell me whether the State Board for Community Colleges engages in a so-called meet and confer process with the Faculty Association as opposed to a meet and negotiate process with the Association?

A. The Board meets directly with the Faculty Association only [R. 409] on a meet and confer contact. Our procedure for the past several years have been to have six such meetings a year, every other month, hour and a half, which the Board discusses any topic on the agenda. That number will be reduced to three in the coming year at the request of the Association.

Q. Who from the State Board participates in the meet and confer meetings?

A. The entire State Board.

Q. And who from the Faculty Association participates in those meet and confer meetings?

A. They have an elected committee, I believe of six people, sometimes the president of the Association is there, usually the executive director of the association is there, I am usually and our director of personnel is usually there. Other members of my staff may come and go depending on the issue.

Q. And you participate in those meetings, also, is that correct?

A. Yes.

Q. Are these meetings held pursuant to the master contract that is negotiated between the State and the Faculty Association?

A. The master contract sets up the procedure for such meetings. I don't believe it sets up the number of meetings or time [R. 410] of meetings. I believe that's been set by Board rule. Master contract specifies a State committee which will be the official representative for the meeting of that type with the Board.

Q. Prior to the first contract becoming effective, was there a meet and confer process in existence at that time?

A. No.

Q. Who of the faculty on the college compuses has access to the Board via this meet and confer process?

A. Those are open meetings, the six members are elected by the Association. I don't know how that happens. We get a certification who the six members are and those six members sit across the table from me and the Board members with the extra people I have mentioned. There have at times been observers, but I don't know how that's done.

Q. At these meetings you say that you sit across the table from one another. Do you sit across the table from one another in essentially the same way as you sit across the table from one another when you are negotiating?

A. No, not really. As a matter of fact, we, not always, we are usually there first, we are on one side of the table and they are on the other. It isn't that formal relationship.

Q. I see. Of the people, the representatives for the State Board, who of them speak and address the group?

[R. 411] A. The chairperson of the State Board usually moderates the meeting. Anyone is free to speak from either side and usually does.

Q. So this is fairly free exchange of views at these meetings, is that correct?

A. Yes, it is.

Q. Do the observers participate in the exchange of views?

A. I can't remember any occasion when they have even asked to participate.

Q. Has there been any occasion when anyone has been at one of the meet and confer meetings and has offered to address the group but has been restricted from doing so?

A. No.

Q. Now you are aware that Mr. Leon Knight from North Hennepin Community College is one of the plaintiffs in this lawsuit, are you aware of that?

A. Yes, I am.

Q. What is the present policy at these meet and confer meetings on the question of whether Mr. Knight, who is not a member of the MCCFA, as to whether Mr. Knight may seek and address the Board on any subject?

A. There is no Board policy in that regard. There has never been such request. The Board has never discussed that possibility, but the meetings are open. Our rules say it's up to the Board to determine whether to recognize members [R. 412] of the audience, doesn't say whether they should or should not. That rule, however, was written before we had meet and confer sessions, written really for public meetings of the Board when they do business. I assume they would operate the same way, the Board would determine whether they speak or not. It's not an open meeting to the extent anybody can come in and talk at any time.

Q. What subjects are discussed at these meet and confer meetings?

A. I would say that most of the discussions centers around rules that we propose or questions that the Faculty Association representatives ask about administration. A lot of it is just exchange of information, where we propose a rule we ask for their reaction to it. We normally don't act until there have been several such meetings.

Q. What do you mean by a rule?

A. For example, during this past year we have had many discussions on a rule that has to do with what the assigned fields of instructors are and two meetings ago, the meeting before last, of the State Board policy was passed in regard to

assigned fields. That has been discussed in meet and confer sessions for a year at least.

Q. Do the members of the Faculty Association team at the meet and confer meetings attempt to influence the Board's decisions on these rules?

[R. 413] A. Yes.

Q. Are they sometimes successful?

A. Yes.

Q. The team I assume presents the Faculty Association position on a particular rule, would that be correct?

A. Yes.

Q. And do you regard this team as the spokesman for the Faculty Association?

A. Yes.

Q. Do you recognize the team as the spokesman, I realize I'm using that term loosely, but do you recognize the team from the Faculty Association as the spokesman for all of the faculty on all of the college campuses, that is all of the teachers?

A. We recognize, I think the Board's position and mine are the same, we recognize that team as giving the official faculty position. We realize there may be other faculty positions held by individuals in the faculty, but official faculty position is one given by that team.

Q. You discuss such topics as faculty involvement in the selection of administrators in faculty, is that correct?

A. We may have, that would be a possible topic.

Q. What is the nature of that discussion?

A. You are referring in general terms to any type of discussion?

Q. No, I'm referring to the nature of the discussion held on [R. 414] the subject of faculty involvement in selecting administrators in faculty. What is that?

A. I don't remember any discussion on that topic.

Q. Okay.

A. All I said was that's a possible type of topic for discussion.

Q. Yes. Do you discuss faculty involvement in the enrollment recruiting and enrollment and recruiting of staff?

A. I don't remember that that's ever been discussed.

[R. 415] Q. (By Mr. Swenson Continuing.) The faculty—you discuss faculty involvement in promotion of staff?

A. I don't think that's ever been discussed. But our rule says that any topic given by the faculty a week prior to the meeting can be put on the agenda, but any of those are possible topics. I'm saying I don't remember any discussion of those topics.

Q. Now, I would like to address certain questions to the specific community colleges, that is the specific campuses. Would it be correct to say that the Collective Bargaining Agreement that presently exists governs the procedures for faculty and Administration exchange of views on all of the campuses?

A. Yes.

Q. Now, by the way, the term "exchange of views" is a term that means—or used to mean—at one time meant "meet and confer", would that be correct?

A. I don't know.

Q. You don't recall whether—the meetings that you have with the—the meetings that the Board had with the faculty team, the Faculty Association team, so far as you know continues to be called meet and confer sessions, is that correct?

A. Yes, I think I'm correct in saying that the meetings held between the State team and the State Board are referred [R. 416] to as meet and confer, and the meetings held between

faculties on campus and Administrations on campuses are referred to as exchange of views.

Q. I see. The Collective Bargaining Agreement that has been negotiated provides for these Exchange of Views Committees on all of the campuses, is that correct?

A. Yes, it does.

Q. And I believe you stated that the Exchange of Views Committees that are possibly on the campuses are—well, perhaps you didn't, but I think they are Personal Student Affairs, Curriculum, Facilities, Fiscal Matters and General Matters, would that be correct?

A. I believe that's correct. In the first contract those six were specified. Each contract has changed that a little bit so they can have just one committee now.

Q. Oh, so each campus is not required to have all six, but may have all six?

A. Yes. They are no longer required. If I remember correctly, the President can reduce the number to three, and with agreement from the Association it can be reduced to one.

Q. Now, would it also be correct to say that all exchange of views between the faculty and Administration on campuswide issues are channeled exclusively through these Exchange of Views Committees?

A. If you are using exchange of views in a formal sense, I [R. 417] think that's true. If you are talking about informal communications, I don't think it's true.

Q. So as to all formal communications that would be correct?

A. Yes.

Q. Would it be, also correct to say that every subject appropriate for an exchange of views—for exchange of views between the Faculty Association and the Administration will

be within the jurisdiction of one of these Exchange of Views Committees?

A. I'm not sure I understand your question.

Q. Well, whatever subject that might be appropriate for exchange of views in a formal sense regarding campuswide policy or some matter affecting all of the teachers on campus or all of the students on campus, that subject would be within the jurisdiction of one of these Meet and Confer Committees, wouldn't it?

A. The Meet and Confer Committees have no jurisdiction, only the Administration has the jurisdiction, only the Administration can set policy. But I assume that any topic that might come up on the campus could come within the purview of one of those committees. In other words, they could represent it.

Q. So these committees on all of these campuses develop campuswide policies to be recommended to the Administration?

[R. 418] A. It's possible. I don't know that they all do, but certainly that possibility is there.

Q. The structure is set up so that could happen?

A. Yes.

Q. And that's the purpose of the structure, is that not correct?

A. Well, that's one of the purposes. The other purpose is that the Administration, which I think more often develops the policy or the procedure or regulation for whatever, and recommends that, then discusses what it recommends with the Exchange of View Committee.

Q. All right. Now, then, what Administration recommends would be discussed by the Administration with the Exchange of Views Committee, but not with just any teacher on campus, would that be correct?

A. Well, I don't think there is any restriction on an Administrator talking to a faculty member, whether the faculty member is a member of the Union or not, but that would be an individual opinion. The official opinion comes from the Exchange of Views Committee.

Q. It is the official and the formal exchange of viewpoints that calls upon the—that calls upon the Administration to present its position to the Exchange of Views Committee, is that correct?

A. I think, if I understand what you're saying, it's correct. [R. 419] The contract provides that the Administration will not adopt a rule affecting certain—and I can't remember those verbatim—there are certain items that affect the faculty that must be taken through the exchange of views process before the rule is enacted. If there is not an agreement, it must be discussed with a second meeting before the rule is enacted. Whether there is an agreement or not, the Administration has authority to act.

Q. Prior to the first contract coming effective was there a requirement that the Administration presents their position or their policy proposals to some Exchange of Views Committee before the policies are implemented?

A. There was no such Statewide policy. It's possible that the constitutions of individual campuses might have required that. As I said in my earlier answer to you, those vary greatly across the campuses that existed at that time.

Q. On all of these campuses, these Exchange of Views Committees are Faculty Association Committees, isn't that correct?

A. That's correct.

Q. Would it be correct to say, also, that the exchange of views process on each of these campuses is a process by which

at least in part the Faculty Association attempts [R. 420] to influence Administrative decisions?

A. Yes, I think so.

Q. Would it be correct to say, also, that on all of these campuses the Administration recognized the Faculty Association Exchange of Views Committees as the exclusive channel—or I should say the exclusive representative of campus faculty views on campus issues?

A. Could I pause just a minute and say that "faculty" is too broad a term here. There are faculty members who are not members of the bargaining unit, but if you are speaking of the bargaining unit faculty, then the Association is the exclusive representative of that group of faculty.

Q. All right. And that exclusivity exists by virtue of the contract, would that be correct?

A. Yes, I think the possibility for it exists by virtue of the law, the actual fact that it occurs is by the contract.

Q. Would it be further correct to say that the purpose of the exchange of views processes on the campuses, on all of the campuses, the purpose is to provide a structure or an avenue by which the Faculty Association can attempt to influence Administrative decisions?

A. That's a purpose. I don't think it's necessarily the only purpose. It's also a vehicle by which the Administra- [R. 421] tion can inform the faculty of its official positions and so on.

Q. Is it not also true that on each of the college campuses the administration recognizes that it must meet and confer with the Faculty Association regarding campus policies?

A. Yes, that's specific in the contract.

Q. Would it be correct, also, to say that the State Board for Community Colleges and your office recognizes that it must meet and confer exclusively with the Minnesota Community College Faculty Association?

A. Well, there is no requirement that my office meet and confer with them, but there is a requirement that the Board meet with them.

Q. And you recognize, also, that—or the State Board recognizes that it must meet and negotiate exclusively with the Faculty Association, is that correct?

A. I am not sure the statement is entirely correct. The negotiation really is conducted by the Commissioner of the Department of Employee Relations, not by our Board. The contract is written for the Board by the Commissioner of Employee Relations.

Q. The Commissioner of Employee Relations meets and negotiates exclusively with the Faculty Association?

A. That's correct.

Q. Now, the meet and negotiate procedure under the Public [R. 422] Employee Labor Relations Act is the exclusive means for the Faculty Association to express its views to the State Board on matters of campus policy, would that be correct?

A. No, I think that would not be correct.

Q. Okay. In what respect would it not be correct?

A. The negotiation process is used only to negotiate the items that eventually turn up in the contract. The meet and confer process is used to discuss items that are not covered in the contract or the interpretations of items that are covered.

Q. So the meet and confer process becomes the exclusive means for expression of views, would that be correct?

A. After the contract.

Q. And the meet and confer process would be the exclusive means for formal expression of views by any teacher on the campus, would that be correct?

A. The meet and confer process is the formal process by which the official position of the faculty as a statewide group is expressed to the Board. When the Board holds its meetings on college campuses, there is opportunity for individual faculty members or the campus faculty to express opinions to the Board in a free and open meeting. That's not considered a meet and confer meeting.

[R. 423] Q. I see. All right.

A. If it would help you, I should point out that the Board has its regular business meetings on college campuses, except for the organizational meeting in July. Every other month they hold a business meeting—they rotate from college campus to college campus. It takes three-and-a-half years to make the swing around, but they go in an orderly progression from college campus to college campus. The morning of that meeting is entirely devoted to the affairs of that campus. The Board is available on campus. Individuals can talk to the Board. Groups can talk to the Board.

Q. In an informal way?

A. Yeah.

Q. Does the State Board recognize that it must not meet and confer with other faculty organizations?

A. I assume you are speaking of within the bargaining unit. Yes.

Q. Yes. And the State Board further recognizes that it must not meet and negotiate with any other faculty organization?

A. Again, within the bargaining unit, yes. We have a large number of faculty members, as you know, who are part-time and do not fall within the definition of the bargaining unit.

[R. 424] Q. And you recognize, also, that—or I should say would it be correct to say that the State Board recognizes that

it must not meet and negotiate with individual teachers who demand such an opportunity?

A. Must not meet and negotiate, yes.

Q. And the Board also recognizes that it must not meet and confer formally with individual teachers who might demand such an opportunity?

A. Yes.

Q. And that is because, is it not, that for the Board to do so would violate the Faculty Association's exclusive privilege to meet and negotiate, is that correct?

A. My understanding is that to do otherwise would violate the law in the collective bargaining.

Q. Both as to negotiation and as to conferring?

A. Meet and confer in a formal sense of the word, yes.

Q. So the State Board, in fact, does not meet and negotiate with any faculty group other than the MCCFA?

A. That's correct.

Q. And in fact, on the college campuses the Administration does not—or at least is not supposed to meet and confer or engage in an exchange of views with any group other than the Faculty Association?

A. In a formal sense, yes.

Q. Specifically on each of the college campuses the [R. 425] Administration are prohibited from and recognize that they must not engage in negotiations with teachers who are not members of the Faculty Association?

Mr. Mueting: Your Honor, I am going to at this point object. I believe this is the third time we have gone over this subject.

Mr. Lindquist: I think it's getting repetitive, yes.

Mr Swenson: All right. We will go on.

[R. 426] Q. Is the Minnesota Community College Faculty Association completely independent from the State Board for Community Colleges?

A. Yes.

Q. And the Faculty Association so far as you know is not a part of the State government, is that correct?

A. It is not.

Q. Would it be correct to say that there are substantial differences of opinion between the State Board and the Faculty Association on issues affecting community college teachers?

A. Yes, I think it would. Also substantial area of agreement, however.

Q. Now, prior to the effective date of the first master contract teachers and administrators on the college campuses could freely exchange views on any subject affecting teachers on the campus policy, is that correct?

A. The words "exchange view", those words are hard to use in this discussion, they have a formal connotation.

Q. All right, let's say just discuss.

A. Yes.

Q. And this would be true even where the teacher tried to influence administrative decision?

A. Yes.

Q. And now the free exchange or the free discussion has [R. 427] become an exchange of views in the formal setting, isn't that correct?

A. I don't think it's correct to consider one completely replacement for the other. It's like different processes. You referred earlier to individual people, that doesn't, you can't compare that with the exchange of views process that takes place now.

Q. Well, as to the official position of the Faculty Association, it is an exchange of views process that communicates the views to the administrator, as you have said?

A. Yes, however, I'm not sure that there was an official position in faculty in most cases before, so it's hard to compare.

Q. Now, did this free exchange of views prior to 1973 in anyway interfere with the operation of the college?

A. From the point of view of administration, I don't think it did.

Q. Did it at all interfere with the quality of a particular teacher's performance as a teacher?

A. I really have no way of knowing that.

Q. You are not aware that the answer to that question would be yes?

A. I'm not aware it would be yes or no, I'm not that close to it.

Q. Are you aware whether there has been some apprehension [R. 428] among teachers and administrators as to what they may or may not freely discuss upon the coming of the first contract?

A. I was aware that there was that feeling at that time, yes.

Q. Are you aware that there is any apprehension any more?

A. Well, I think the whole atmosphere is much more relaxed now than it was eight years ago.

Q. Things have settled down and become formalized?

A. Formalized or informalized, at least there isn't the strain that there was after the first contract.

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[R. 431] CROSS-EXAMINATION

By Mr. Mueting:

Q. Chancellor Helland, you have at various times in your responses to Mr. Swenson's questions made a distinction between formal meet and confer and other types of communication. What were you referring to when you talked about formal meet and confer?

A. Meetings specified in the contract.

Q. What is your understanding of that meetings as specified in the contract.

A. The contract sets up a meet and confer at the State level and another one at the college level and requires that the Administration, each level meet with that committee, and that's what I meant when I referred to the meet and confer sessions.

Q. Or exchange of views as that term—

A. Exchange of views at the college level, meet and confer usually at the system level.

Q. Is it your understanding that that is the only type of—or the only forum that college Presidents or Administrators or the Board can utilize to receive information from anyone including members of the bargaining unit?

A. No.

[R. 432] Q. Are there other forums for faculty members to express views to community college administrators?

A. "Forum" may be too strong a word, but there are opportunities. I mentioned the one when the Board is on campus. There an opportunity for people to speak to the Board in an informal way. I know that Presidents have used a variety of means to get opinions of people regardless of whom they are, and usually it's a mixed group: students, faculty, Administrators, whomever, some kinds of town meeting—one has held such a meeting, for example, I know another President who

makes himself available in the college commons in the cafeteria for people who would want to come to him and talk on any subject. But those are not within the context of what we would describe as meet and confer or exchange of views.

Q. Is it your understanding that these processes outside of meet and confer are utilized to obtain information concerning any subject that the employees may deem important to discuss?

A. Yes. I think in most cases the Administration only makes itself available. It doesn't utilize that as a means to go and get information as much as to give information.

Q. Have you ever met informally with faculty members?

[R. 433.] A. Many faculty members have stopped in my office and said, "I would like to talk to you," and I said, "Come on in." I have talked to many faculty members over the years unofficially.

Q. Have you ever advised any faculty members over the years that you were unwilling to listen to anything that they have to say about the contract or terms and conditions of employment or anything that they wish to speak about?

A. No. I have never told them that I wouldn't listen to them. I have, however, at times told them, "I can't negotiate that with you or I can't—" You know, that's, you know, another area.

Q. Have you ever had any of the Plaintiffs in your office as far as you know, the Plaintiffs in this lawsuit, to discuss whatever they wish to discuss?

A. I am not even aware of who the Plaintiffs are. I believe Virginia Lanegran is the one. Virginia Lanegran has worked in my office for the last couple of years.

Q. Over that period of time have you had discussions with her?

A. Oh, yes.

Q. And has she initiated some of those discussions with you?

A. Yeah.

Q. Have you ever advised her that you can't talk about any [R. 434] particular subject she wants to discuss?

A. No.

Q. Do you receive correspondence from faculty members?

A. Yes.

Q. Do you ever make any distinctions in these conversations between Association members and nonAssociation members?

A. No. I don't know who Associations members and non-Association members are.

Q. When we are talking about Association, we are talking about the Faculty Association?

A. Yes. I do make it very clear, Mr. Mueting, that the opinions expressed in any such conversation are strictly opinions of individuals, not of the Faculty.

Q. Have you ever or has the Board ever implemented a policy to prevent individuals from communicating their own opinions to you or to the Board?

A. No, I don't remember any such.

Q. In making policy decisions or rules, as far as you know, does the Board take into consideration only the views expressed by the Faculty Association representatives in the meet and confer sessions?

A. I think it's impossible for Management not to know what some other people feel, but there is no attempt made by Management to secure that type of opinion. We take the opinion of the Association as the opinion of the [R. 435] faculty. We, however, know just through whatever grapevine exists in the world what other individuals think on issues, and I think

it's fair to say that sometimes the Administration's position is influenced by that informal knowledge as well as by the—

Q. Could this or does this informal knowledge come to you, to the Board or to other Administrators through what we have just been discussing as informal communication with faculty members?

A. I think there is very little informal communication from individual faculty members to the Board because the Board is there so infrequently and the Board is kind of away somewhere, but I think the informal communication comes through Administrators who talk to many people on their campuses and know a great deal about how people feel, but that only shapes their own thinking and they really are talking to us as they feel individually. I should say there are a great number of opportunities for a Dean, for instance, to talk with individual faculty members. The contract requires conversations between them on certain topics. It's reasonable to assume that those discussions go into other areas as well.

Q. Have you ever been advised by the Faculty Association that you should not be communicating with nonAssociation members?

[R. 436] A. No, I think the Association has realized that I keep that line very clear as to what's the official view of the faculty and what's an individual bending my ear.

Q. There has been discussion about the policies and procedures and attitudes prior to 1973 and after 1973. Immediately after the first contract was implemented was there a period where people were having difficulty coming to grips with the implementation of the contract?

[R. 437] A. Yes, I think both sides were neophytes in this business. We didn't know what was right and what was wrong. The threat of unfair employment practices was frightening

to many people so people tended to play it very close to the vest and to do just what they knew they could do.

Q. (By Mr. Mueting continuing) Has that changed over the years?

A. Very much.

Q. Could you explain how it has changed?

A. I hear very little any more of people saying, "you can do this or you can't do that because the contract says you can or can't do it" in terms of communication.

Q. Prior to 1973 there was a faculty association in existence, wasn't there?

A. Yes.

Q. Did you have contacts, formal contacts with the association?

A. Yes.

Q. Was there any meeting and negotiating prior to 1973 between the Board or any representative of the State and the faculty association concerning terms and conditions of employment?

A. There was no negotiation.

Q. Did you meet with any individual representatives of the faculty association?

[R. 438] A. Yes. The common procedure then was for the faculty at each college, the faculty association at each college to elect a welfare chairman and I met with that group of welfare chairmen and we together developed what we thought was an appropriate position to be presented to the legislature in terms of salary increase, whatever, in the area of working conditions. Then, when we were agreed—the first couple times we were agreed—and the first couple times we were agreed—we had a long way to go and it wasn't hard to agree—and then I took that to the Board and the Board agreed, then I took

it to the legislature. After a couple sessions, however, legislative sessions, then we started to divide in terms of whether the Board and I felt that strongly as the faculties did about their need for increases, and that's when we kind of started to go our separate ways.

Q. We are talking about the prior to 1973?

A. Yes. We went through a series of relationships starting with a very informal recognition and ending up with quite a formal recognition that existed prior to the determination of the bargaining units.

Q. What was the recognition? What was meant by recognition?

A. The faculty association was recognized as the spokesman or spoke-whatever it is for the faculty and before the [R. 439] Board and the president of the faculty association was allowed to speak for the faculty at Board meetings.

Q. Was Leon Knight one of the presidents that spoke for the faculty association given the faculty's point of view on particular subjects?

A. He was the president at one time during that period, yes. I can remember that very clearly because the Board chairman introduced him one time as "neon light."

Q. Did you ever during this period prior to 1973 ever negotiate contracts with individuals, individual faculty members or individual groups of faculty members?

A. No. I assume by "contracts" you are referring to a document like the contract we have now.

Q. Negotiate those types of terms and conditions of employment that are binding on a particular individual as part of their employment relationship.

A. I think I should qualify my answer then, because we did—then, we went to the legislature with what we had agreed

upon and the legislature usually didn't give us everything we asked for. Then we went back to the faculty association and we met and conferred about what the Board rules were going to be, what the salary structure was going to be, what the leave policy was going to be and so on, but the Board at that time was in the position of making a rule after they dealt with meeting [R. 440] and conferring.

Q. In those cases who would have the ultimate decision-making authority?

A. The Board.

Q. Has the Board ever conferred decision-making authority—let's talk about prior to 1973. Did the Board ever confer decision-making authority on any faculty member or group of faculty members, talking about policy-making decisions, policy types of decisions?

A. The only authority conferred was to be the official spokesperson for the faculty.

Q. On individual compuses who was the party the Board delegated official responsibility for making policy-type decisions?

A. I don't wish to get into semantics, but in our system policy is not made at the campus level. It is only made at the Board level.

Q. Are there local types of policies?

A. There are local regulations, yes.

Q. Who has the authority to make those?

A. The president.

Q. Has that ever been delegated to any faculty member?

A. I think prior to 1973, as I said in my earlier testimony, there was a great range in terms of how much leeway was given and how much the president delegated of the [R. 441] president's authority. They came from a background of school

districts, and in some cases the faculty senate had considerable delegated authority, and in some cases none.

Q. Maybe you could explain that a little bit more as to how the community college system was initially formed.

A. Prior to 1963 the community college—there were junior colleges then that existed as units of public school districts. In 1963 the law set up a state board and gave that board authority to set up a system of state junior colleges. It allowed the school districts to come into that system if they wished to do so and if the state board wished to take them in, and they all asked to come in and the board took them all in. So that is how the state system started. But during those first years the colleges were very different in many respects, salary schedules—there were eleven different salary schedules the first year, for example, but by agreement with the faculties, really, at the insistence of the faculty we went toward the uniform salary schedule. Everyone wanted equal pay for equal work in the same system.

Mr. Mueting: Okay. I have no further questions at this time of this witness.

Mr. Goodwin: I have no questions.

[R. 442] Mr. Lindquist. Any redirect or recross or whatever?

REDIRECT-EXAMINATION

By Mr. Swenson:

Q. Dr. Helling (sic) you testified that in response to one of Mr. Meuting's questions that there seems to be a policy that you will talk to any faculty member about any topic, or the administration will talk to any faculty member about any topic.

A. I think it is an over statement to say that there is a policy. It is fair to say that that's a practice.

Q. This is the practice, yes. Now, will you do negotiations with Mr. Leon Knight, or neon light, whichever you prefer?

A. If you are talking names, my name is Helland, and Helling was here Tuesday.

Q. Yes, all right. Will you negotiate a salary with Leon Knight?

A. No.

Q. Will you meet and confer formally with Leon Knight?

A. No.

Q. Will you meet and confer with him on class schedules?

A. I will not, but his dean will on his class schedules.

Q. Well, I mean on a formal meet and confer basis, will his dean meet and confer with Leon Knight?

[R. 443] A. I am not sure how that operates on the campus level. My impression is that the departments meet with the dean and talk class schedules, and I am not aware that there is any differentiation between unit members—or association members or non-association members.

Q. All right, now you have said, also, that there now is very little concern, at least manifested concern, regarding what administration and teachers can do or cannot do in the way of discussion, I guess, or exchanging of views. Isn't that true because the process has evolved sufficient so that everyone seems to understand what the process is and what the system is?

A. Yes, I think so, and I should point out that the ease with which that takes place varies from campus to campus. I am speaking generally of the system.

Mr. Swenson: Nothing further.

Mr. Lindquist: Very well.

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TRIAL TESTIMONY OF JOHN FEDGE HELLING

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[R. 211] Q. Are you responsible for the supervision of the faculty?

A. Yes, I am for any operations of the college. I delegate the supervision of the faculty to the Dean of Instruction and her Associate Deans.

Q. Do you deal with the Minnesota Community College Faculty Association at all?

A. Yes.

Q. Do the other Administrators at the college deal also with the Faculty Association?

A. Well, directly they do if they are on an EOV committee.

Q. I see. How long have you been President at North Hennepin?

A. I came there on a part-time basis in the spring of 1967 and started full-time on July 1 of 1967.

Q. Is the Administration at North Hennepin Community College subject to the terms of a Collective Bargaining Agreement that exists between the Faculty Association and the State of Minnesota?

A. Yes.

Q. Now, this Collective Bargaining Agreement governs procedures and establishes procedures for faculty and administration exchange of views, isn't that correct?

A. Part of it, yes.

Q. Now, I would like to clarify just exactly your involvement in the exchange of views process. Do you get [R. 212] personally involved in that or is that something that is delegated largely to other Administrators at the college?

A. We have three Exchange of Views Committees and I serve on one for the Administration. I serve on the General EOV Committee. We have a Curriculum EOV Committee. We have a Fiscal/Personnel EOV Committee, I am not on that, but six members of the Administrative staff are on each EOV Committee.

Q. So you are on the General EOV, which is the exchange of views?

A. Exchange of views, yes.

Q. Which Administrator is on the Curriculum EOV?

A. Well, we have six Administrators on each one. I can tell you the six on the General but the main person on the Curriculum one, Dean Losoe, Dean of Instruction.

Q. Who on the Fiscal/Personnel?

A. Well, we have our Business Officer, Rick Ellison is the main person on that one.

Q. Now, are the Exchange of Views Committees essentially the so-called Meet and Confer Committees that existed apparently prior to—well, sometime in 1973, apparently, '73 and '74, is that correct?

A. That's the terminology we used then. They are the same committees.

Q. Now, does the Collective Bargaining Agreement provide [R. 213] for these Exchange of Views or Meet and Confer Committees?

A. Yes, it's specified in the contract.

Q. I want to show you what has been marked as Plaintiffs' Trial Exhibit No. 1 and ask you if that is a copy of the contract that you are referring to as the Collective Bargaining Agreement governing faculty-Administration exchange of views?

A. It is.

Q. All exchange of views that occurred between the faculty and Administration is channeled exclusively through these committees, is that correct?

A. All exchanges of views that occur between the faculty and Administration come through these committees.

Q. Yes.

A. No, I don't believe so.

Q. In what way is that not true?

A. Well, I think that the word "exchange of views", I guess we should keep it in that committee and that's the formal term; but I think that we do, upon occasion, have opportunities for some give and take on the campus, not going through the EOV Committee.

Q. Well, these Exchange of View Committees that are established by the contract are the exclusive channels for dealings between the Administration and the faculty on matters that are within the jurisdiction of [R. 214] those committees, is that correct?

A. I believe so, yes.

Q. Would it not be true that every subject appropriate for an exchange of views by the faculty and Administration will be within the jurisdiction of one of these committees that you have mentioned; the General Committee, the Curriculum Committee or the Fiscal/Personnel Committee?

A. Will you restate your question?

Q. Every subject appropriate for exchange of views between the faculty and Administration will be within the jurisdiction of one of these committees, isn't that correct?

A. We do not—there are six possible committees. We only have three on our campus and they are the three that I mentioned, General Matters of Curriculum and Fiscal/Personnel. Therefore, we do not talk about matters that fall under the

other three committees like Personnel—I forget what the other committees could be, I guess Student Services.

Q. Okay.

A. The General Matter, to clarify though, is really a casual, and I guess I should answer yes to your question because in the General Matters Committee anything could be brought up.

Q. All right. Now, these committees develop campus policies, [R. 215] recommendations for submission to—well, do they development recommendations?

A. We have not formalized the wording of the rules of the EOV Committees to say that these are recommendations. Matters are discussed at the EOV meetings but policy decisions are not made there. The matters having been discussed then are referred to the Administration because through the minutes we discuss them in the Administrative meetings and then if we feel that the policy is a good one we will adopt it or not.

Q. But the Exchange of Views Committees are designed for the members of the Faculty Association to channel the views of the Association to the committees and then to the Administration, is that correct?

A. Yes.

Q. Do the views that are developed in these Exchange of Views Committees go directly to the Administration or is there an interim unit of the Faculty Organization to which the views first go; that is to say, is there an Executive Committee or some sort of an association committee?

A. I'm really not very familiar with the process that occurs before the matters come to the EOV. That's within the Association and it's their business. I really don't know how

they channel their information up to the EOV [R. 216] Committee members.

Q. And when the views get to the EOV Committee then do they go directly to the Administration without stopping off at some interim group?

A. Yeah, when we are done with an EOV session if we have discussed let's say four topics, those topics are written up in the minutes and then we address the topics as Administrators at our next Administrative meeting. There is nothing in between there.

Q. I see. At the General Matters EOV Committee Meeting then the Administrators attend, the faculty attends, the exchange of views occur and then you go back to your Administrative position and consider the discussion?

A. Act on them or not.

Q. Yes. Now the so-called EOV, or what was once called the Meet and Confer Committees are agencies of the Minnesota Community College Faculty Association on the North Hennepin campus, is that correct?

A. That's correct.

Mr. Mueting: I'm going to object to that question as calling for a legal conclusion with regard to the term "agency." Agency has a very specific legal meaning. I think that asking him that question is making him come to some legal conclusion with regard to the relationship between [R. 217] those committees.

Mr. Lindquist: Well, why don't you ask him what the relationship is?

Mr. Swenson: Well, the question has been answered already but let me restate the question.

By Mr. Swenson:

Q. Are these EOV Committees components of the Minnesota Community College Faculty Association on your campus?

A. The membership on the EOV Committee, from the faculty, are elected by members of the Association on campus.

Q. Now, when you are referring to the Association you are referring to the College Faculty Association?

A. Yes.

Q. Now, isn't it true that by this process of the Exchange of Views Committees, the Faculty Association attempts to influence Administrative decisions?

A. Yes.

Q. And in fact isn't that really the purpose of the exchange of views structure?

A. I view it both ways. I think that it's an opportunity for the Administration to, you know, explain their points of view on things too and, consequently, get more support for their point of view. But I would certainly think that the discussions we have had with faculty, from their point of view, have been to influence the issues.

[R. 218] Q. Now, you recognize the Faculty Association as the exclusive agency that represent the views of the faculty on the North Hennepin campus, is that correct?

A. Yes.

Q. Now, it's true also, is it not, that you recognize that the Faculty Association can require you to meet and confer or enter into these Exchange of Views Committees with it regarding college policy?

A. Yes.

Q. Now, the source of that power of the Faculty Association is the Public Employee Labor Relations Act, isn't that correct?

A. Well, I think it is. That was the act passed in 1973, just to name them to form an agency?

Q. Yes.

A. Yes.

Q. Now, the first Master Contract that became effective on your campus and on all other campuses became effective in the spring of 1973, do you recall that?

A. It was concluded in April of '73. I don't believe that we started to operate under it until July 1.

Q. All right. So as of July 1 of 1973 it became effective. So I want to go to the period prior to that time. Prior to that time was the Minnesota Community College Faculty Association in a position or did you recognize [R. 219] the Association as being in a position to require you to meet and confer with it regarding college policy?

A. No.

Q. Now, presently you do not recognize any other group of the faculty other than the MCCFA as having the right to require you to meet and confer with it, isn't that correct?

A. Correct.

Q. So you do not recognize such power in any parental group, either, is that correct? That is, there is no parental group that has power under any law to require you to meet and confer or meet and exchange views between the Administration and the parental group, is that correct?

A. Yes. I'm not quite sure what you mean by the word "parental" in this instance.

Q. Well, I mean, parents of students who are at the college.

A. The average age of our students, Darel, is 28.

Q. Well, they still have parents?

A. No. I just don't think of them as younger people. I was thinking you meant the Community College Board, or something like that.

Q. All right. Let's go to the students then. Would you recognize the students as having the power to require to meet and exchange views with the Administration?

[R. 220] A. I'm really not sure on that point. We meet with them on a regular basis. And I believe that they have a Students' Bill of Rights that if they wanted to push it I believe that they could have some regular meetings or meetings with the Administration in order to influence us.

Q. Would this be true also of taxpayer groups?

A. Well, I don't believe so. There is no document that gives them that but I believe there is a Student Bill of Rights that does.

Q. The Student Bill of Rights is really a local arrangement that has been entered into?

A. No, it's a statewide or a systemwide Bill of Rights.

Q. A systemwide Bill of Rights?

A. Yes. We have never really come to that issue on campus. As I say, we do meet with the students every fifth week, the fifth Wednesday to discuss.

Q. But the issue of being required to meet with them has never come up?

A. No.

Q. And you do not recognize any right in any individual teacher to require them to meet with that teacher and exchange views, isn't that correct?

A. That's correct.

Mr. Mueting: I'm going to object to that as a [R. 221] conclusion as to the rights of individuals. We are talking about constitutional rights, statutory rights and contract rights, all of which require legal conclusions. So I ask that the answer be stricken and my objection be upheld.

Mr. Swenson: We can rephrase the question.

By Mr. Swenson:

Q. Do you recognize that any individual teacher may require you to meet and confer or exchange views with the Administration?

Mr. Mueting: Same objection. Asking the same conclusion in a different way.

Mr. Lindquist: The objection is overruled.

Q. You may answer.

A. Speaking of a teacher as an individual and not a member of the Faculty Association, no, I don't recognize where they have any power to compel me to sit and listen.

Q. And in fact you do not meet and confer or exchange views with any faculty groups other than the Exchange of Views Committees, isn't that correct?

A. Well, strictly speaking maybe not in that sort of EOV setting. However, I have on at least two occasions, and I guess more, but on two occasions have invited all members of the college community to either that breakfast we talked about or to an afternoon meeting that [R. 222] we had last winter to do really nothing more than discuss concerns—campus concerns, get their feelings about problems. There is no real agenda except a general one where they can bring up what they want. So in that sense I have tried to keep the door open for hearing what the faculty or classified staff have.

Q. But then this is something that you do as a matter of personal policy, is that correct?

A. Yes. There is no college policy that requires that. I just have felt that I have lost touch with some of the faculty and would like to be able to visit with them.

Q. You are in fact prohibited from engaging in a meet and confer process with anyone other than these Exchange of Views Committees, isn't that correct?

Mr. Mueting: I'm going to object to that as asking for legal conclusions with regard to the President's obligations and prohibitions.

Q. Well, you recognize the terms of the contract, isn't that correct? I mean, you have read the contract are?

A. Yes.

Q. And what is your understanding as to what that contract allows you to engage in a meet and confer process with persons other than the Exchange of Views Committee?

Mr. Mueting: I'm going to object to that question first as being irrelevant as to what he [R. 223] thinks the contract means. Second, it calls for a legal conclusion as to the contract terms—the very specific contract and statutory terms.

Mr. Lindquist: Why don't you ask him what his practice is.

Mr. Swenson: That's going to be my next question.

By Mr. Swenson:

Q. What's the policy of the Administration with respect to engaging in meet and confer or exchange of view processes with persons other than the Faculty Association?

A. Well, we are not supposed to do it.

Q. And do you know what the source of that prohibition is?

A. Well, the contract is our source of it. I don't know if there is other legal sources.

Q. Now, the Minnesota Community College Faculty Association is not a subunit of the Community College Board, is it?

A. Uh-uh.

Q. This Association is not a component of the State government like the Board is a component of the State government, is that correct?

A. That's correct.

Q. In fact, the MCCFA is entirely an independent agency outside of the Minnesota Community College Board, is that correct?

[R. 224] A. That certainly, as far as my understanding of it is.

Q. In fact, are there not real conflicts of interest between the Faculty Association and the Administration from time to time?

Mr. Mueting: I'm going to object as first being irrelevant; second, calling for a conclusion as to what a conflict of interest is.

Mr. Lindquist: Yes, I sustain the objection. When you talk about conflict of interest you get into an area that covers so many possibilities that I don't know if it would be relevant at all to our discussion here or our issues.

Q. Now, do you recognize or it is your policy that you cannot recognize any other teacher organizations during the term of this Collective Bargaining Agreement?

A. Well, we don't have a policy written like that for that portion of our handbook. We incorporate the Master Contract and live by that. But what you are getting at is we don't sit down formally and recognize another group, that's true, we do not.

Mr. Lindquist: Aren't many of these matters covered in your Stipulation of Facts?

Mr. Swenson: I'm not aware that that's true, Your Honor.

Mr. Lindquist: Oh, really?

[R. 225] Mr. Swenson: I don't believe that's true.

Mr. Mueting: Our Stipulation includes provisions of the contract that pertain to the recognition of the Union. I think some of those types of conclusions are self-evident after reading those portions of our Stipulations.

Mr. Swenson: All right.

By Mr. Swenson:

Q. You recognize that the Plaintiff, Leon Knight, is not a member of the MCCFA, is that correct? Do you recognize that?

A. Leon has told me that he is not. I don't pay much attention to who joins and who doesn't join.

Q. Now, if it were possible for Leon Knight to confer with you individually on subjects that are normally covered by the Exchange of Views Committee, his conferring with you would not in any way impede his performance as a teacher, or impair his performance as a teacher on the college campus?

Mr. Mueting: I'm going to object to that as calling for a hypothetical and for a conclusion which is probably beyond the scope of this witness's personal knowledge.

Mr. Lindquist: What are you trying to prove?

Mr. Swenson: We are trying to establish [R. 226] whether or not there is any basis in Mr. Knight not being able to speak directly with the Administration at the college based upon the possibility that if he were to do that that that might somehow impair or undermine his teaching performance. The question is whether or not we may restrict the speech that Mr. Knight might engaged in on the grounds that a failure to—or on the basis that is justified by avoiding Mr. Knight not performing his job properly, that's all. The question is whether there is some college objective here to be achieved by silencing Mr. Knight.

Mr. Lindquist: I will let you go ahead with the background information.

By Mr. Swenson:

Q. All right. So would Mr. Knight's conferring with you in any way impair or impede his ability as a teacher, his performance as a teacher?

A. I don't know if it would trouble him at all. I don't believe that the Administration would do anything as a result of the conversation we had with Leon to jeopardize his teaching or injure his ability to teach.

Q. Would his conferring directly with you interfere with the college's Administrative discipline of it employees [R. 227] at all?

A. No. Leon and I talk occasionally about a number of things and it doesn't interfere with our organization.

Q. And it wouldn't interfere with the operation of the college generally either, would it?

A. No.

[R. 228] Q. (by Mr. Swenson continuing) Is there any way in which it would create a situation adverse to the administration of the college?

A. Well, we do have our first obligation to any policy change to see that it goes through an EOV process. Now, we can, as administrators or the president, make a final decision, but it can't be made without having been exposed to EOV, I don't think. It might create some bit of a conflict in the decision-making process if we were to listen to all five, but that's —as much as we can do, we try to do that.

Q. And the reason why it would create that conflict or the problem that you alluded to is simply that Leon Knight is not a member of the MCCFA, isn't that correct?

A. Well, he might have a different point of view. I hadn't thought about it as his, you know, not being a member of the MCCFA. It hasn't been a problem yet, that nobody has grieved that or said that we have talked with people when we shouldn't have or anything. I meant it would be possible that we would have a variety of influences on the decision-making process and create some conflict that way.

Q. I see.

Mr. Swenson: We have no further questions.

Mr. Mueting: I would like to ask Dr. Helling [R. 229] a few questions.

CROSS-EXAMINATION

By Mr. Mueting:

Q. How would you describe your relationship with faculty members generally on your campus?

A. Well, I think—I feel that it's congenial on a person-to-person basis.

Q. Do you do anything to maintain that congeniality?

A. Yes, I try to.

Q. Could you describe what those things are that you do?

A. Well, we organized a softball team and played all Sunday afternoon at a tournament out there at Brooklyn Park—and won. But it's kind of an example of how I think it's important to interact with faculty. We had members on the team. But in terms of other more formal things, we try—I try to at least from time to time have the opportunities when faculty can discuss matters in a form setting.

Q. What form is that?

A. Well, I have, since the strike we have had at least two times when I have just really invited faculty to come and either have coffee and donuts or breakfast and express their concerns. As Morgan mentioned, at the beginning of each academic year we have a day devoted to really bringing those things together, orienting faculty, dicussing problems.

[R. 230] Q. When you have had these breakfast get togethers, do faculty respond to your invitation?

A. Well, it seems—when we had the breakfast we had a much better turn out than when we had just black coffee and donuts in the afternoon, but I think we had a very good turn out from all staff.

Q. What types of things are discussed at these meetings?

A. Well, they are really quite informal. I remember one time when the AV department was somewhat maligned because they weren't getting the projectors out and operating on time, and it was kind of an interesting discussion going on across the room (indicating). I tried to stay out of it. But it was the sort of thing that has to do with the operation or housekeeping of the college.

Q. Do you set any limits as to what can be discussed at these meetings?

A. Well, no, there were no parameters on it.

Q. In your personal administration of the college do you maintain an open-door policy with regard to staff members?

A. Yes, I do.

Q. And as a result of that policy or taking advantage of that policy have people come to talk to you at various times, either by appointment or without an appointment?

A. Yes.

Q. Are these people faculty members at North Hennepin?

[R. 231] A. All kinds, faculty members, classified people, students.

Q. Have you ever advised any person who has asked to speak with you that they are not permitted to speak on any particular subject?

A. Not to my recollection, I have not. I think at the very beginning when the contract first became operable we might have kidded about that occasionally.

Q. In practice have you ever limited anyone's access to you to discuss matters relating to the college or anything else?

A. No, no, I don't believe I have. No, I have not.

Q. Is Leon Knight one of the individuals who has met with you on these occasions?

A. Yeah.

Q. Have you met with Leon Knight more than once?

A. Over—since the contract?

Q. Since 1973.

A. Sure, many—

Q. How often would you say?

A. —many times.

Q. Do you ever make distinctions with regard to faculty members based on their affiliation or nonaffiliation with the exclusive representative, that is the MCCFA?

A. Only when they are asking in their formal capacity.

Q. Would you explain what you mean by that?

A. Well, the association has the grievance representative. [R. 232] I treat that particular faculty member as a grievance representative during those times when they are grieving. The president of the association and I, you know, have certain obligations that we have to perform together. As a faculty member, I treat them as an association member at that time.

Q. Do you know at any given time which faculty members are members of the MCCFA and which faculty members are not?

A. No, I really don't. I, you know, there are some that you are bound to note that they are members because they belong to the executive committee or council, but, you know, across the board, no.

Q. Prior to 1973 you were a president of the college, is that correct?

A. That's correct.

Q. Are you familiar with the faculty senate operation that was in existence at that time?

A. Yes.

Q. Did the faculty senate ever have responsibility or authority to make any final decision concerning college policy?

A. No.

Q. Who had that authority?

A. On our campus I did.

Q. And you were the president at that time?

[R. 233] A. Yes.

Q. Do you still have the authority to make those final decisions?

A. Yes.

Q. In making those final decisions are you bound in anyway by the faculty association's Exchange of View Committee recommendation?

A. Not technically, but the wording of the contract is such that you really are under stress to pay a great deal of attention to the EOV Committee actions or discussions. Really, I think the word is listen and act in good faith, and so—

Q. Do you listen only to persons on the Exchange of View Committee before making policy decisions?

A. No.

Q. I believe you made a statement towards the end of your Direct Examination that you try to listen to all sides. Was that with regard to the type of policy you have concerning your decision-making process?

A. Yes.

Mr. Mueting: I have no further questions.

CROSS-EXAMINATION

By Mr. Miller:

Q. Dr. Helling, I have only a few questions. You indicated in response to a question from Mr. Mueting, I believe, [R. 234] that you personally have not instructed or informed any

faculty that they could not discuss certain subjects with you, do you recall that testimony of yours?

A. Yes.

Q. A question related to that. Have you ever taken any steps to inform any of your administration that they should not discuss any list of subjects with faculty members?

A. Yes.

Q. What subjects have you so instructed your administrators about?

A. We had a statewide work shop shortly after the original contract was drafted, and we were instructed as a group of administrators by the Board office staff that we were not to, you know, formally discuss matters relating to—well, policy in terms of curriculum, fiscal affairs, facilities, that sort of thing with other than the correct representative. After that workshop we went back to North Hennepin and reviewed the contract and did essentially the same thing. So in trying to answer your question, we did it both on a statewide level and then on a local level.

Q. Is it fair to say that the restriction you just described is that you are not to engage in meet and negotiate about terms and conditions of employment with any other group than the MCCFA?

[R. 235] A. Well, that's true, possibly at the system level, but on each individual campus, there is no negotiation.

Q. I understand. Do you distinguish between the meet and negotiate and meet and confer processes?

A. Yes.

Q. And it's your testimony that in terms of listening to faculty members about policy decisions of the North Hennepin Community College that you do maintain an open door and are

willing to listen to all sides before making a decision on policy matters?

A. Yes, I try to do that.

Q. Dr. Helling, has any representative of the MCCFA ever told you that you should not follow that practice with respect to receiving input from all sides on policy issues at the college?

A. Yes.

Q. In what way were you so informed?

A. We sent out a questionnaire when we were doing our self study to faculty and tried to get their reflections on ways in which we were operating that could be improved, and a couple of the responses we got were that—they were very critical to the administration because we listened to the scabs.

Q. That was in regard to the strike that was conducted—in what year was that strike conducted?

[R. 236] A. I believe it was in the spring of 1979.

Q. Thank you. Is it fair to say that you have disregarded those critical comments in that you have continued your open-door policy on receiving input on policy issues from all faculty members?

A. Well, yes, I have, but I have never—other than in a group setting—taken the initiative in soliciting faculty opinion. Like I won't go to Morgan and ask him. It's true Morgan has never come to me, either. And I believe most of the faculty who are not members have not done this, except in this open forum setting, whether it's in the beginning of the year or one where I have invited.

Q. You have not discouraged them from coming to you?

A. No.

Q. Leon Knight as an individual has come to you over a period of years since 1973 to discuss various campus policy issues?

A. No. I would not want to say—what Leon and I have discussed, it ranges all the way from his personal life to his poetry to ideas that he has that may have effect on the college.

Q. Okay.

A. That's true.

Q. So that they could impact or deal with policy issues?

A. Well, it's very hard not to. I think you really wouldn't say very much to anyone that wouldn't have some relationship [R. 237] in the long run to some policy.

Q. One small item, Dr. Helling. During your responses to Mr. Swenson's questions you indicated that you would not recognize any other faculty group. My question to you is was your response to that question recognized in terms of attempting to meet and negotiate terms and conditions of employment? Is that the kind of recognition that you had in mind?

A. Yes, the formal type of recognition.

Mr. Miller: Thank you, I have no other questions.

REDIRECT EXAMINATION

By Mr. Swenson:

Q. Mr. Helling, would you explain or identify that Board office meeting or staff that you attended in which you were instructed that there were certain topics that you should not discuss with certain faculty people?

A. I believe we have had a couple like that. I just don't recall if—where the first one was held. I can't remember which college it was held at. We had one at Inver Hills, but it was the chancellor, the fellow who had been on the negotiating team from the State—

Q. From the State Negotiator's office?

A. Yes. I can't recall his name right now, but I will in a minute. Other people from the Board office that—

Q. Charles Swanson (phonetic)?

[R. 238] A. No, this was before Charlie.

Q. All right. Well, anyway, would you go ahead and explain further the—

A. Well, it was a meeting to go through the completed contract. None of us had ever administered—well, I had in business worked with unions before, but we had never administered under a contract situation before, so it was really a workshop to talk to us about the implications, the rules laid down, the procedures laid down in the contract, the implications, and how we should handle it.

Q. But it was a meeting, a workshop that was organized and sponsored by the Community College Board, is that correct?

A. The chancellor's office, yes.

Q. Was there any printed material distributed at that time, a workbook or handbook of some sort?

A. I don't recall that. We all got copies of the completed contract at that time, I'm sure.

Q. The Board that we are talking about here, the exact name of the Board is what?

A. The State Board for Community Colleges.

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TRIAL TESTIMONY OF
DALE A. LORENZ
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[R. 981] Q. Now, in 1973 the community college system negotiated a Master Contract with the Minnesota Community College Faculty Association, is that correct?

A. That's correct.

Q. Now, at the present time under that Master Contract, are you required to exchange views with the Minnesota Community College Faculty Association?

A. We're required to exchange views with the Faculty Association, yes.

Q. Could you briefly describe how that works?

[R. 982] A. On the local campus?

Q. Yes. You have certain committees on your campus out at Normandale.

A. At Normandale we have three committees. Three exchange views committees: General Matters Committee, Personnel Committee, and the Curriculum Committee.

Q. And who's on those committees?

A. We have the faculty—the local chapter of the Faculty Association appoints faculty members and I appoint Administrators on those committees.

Q. Are only association members—and by that I mean Minnesota Community College Faculty Association—are they the only ones now serving on the Exchange of Views Committees?

A. I do not know. The Association makes that decision.

Q. Are you on any of the Exchange of Views Committees?

A. I serve on two of the committees.

Q. Which ones are those?

A. Personnel and General Matters.

Q. Have you ever had an instance occur during any Exchange of Views session where an individual, other than a Minnesota Community College Faculty Association member, tried to give his views?

A. I very frankly do not know which faculty members are members and which faculty members are not members.

[R. 983] Q. Assume the following facts, then, based on your experience as President and also serving on the committees, assume that a person who is not on the Exchange of View Committee was present in the room and tried to present his views. Would he be permitted to present his views?

A. We have within the college a procedure for exchange of views, as we call it, and we have the provision for special witnesses. Prior to each meeting the Chairperson of the faculty and the Chairperson of the Administration can agree on such witnesses. The meetings are totally open so any faculty member may attend the meetings and not speak. But, only special witnesses may speak. So, it takes the agreement between the Chairpersons—faculty and chairperson of the Administration on special witnesses.

Q. So, either side could block a special witness appearing?

A. That is correct.

Q. Has that ever happened on a committee that you've been on or you were aware of or remember?

A. On any committee? It has never happened that I ever served. I'd be very surprised if it happened on the Curriculum Committee.

Q. You don't serve on that committee?

A. I attend, but I don't serve on that committee.

Q. Under the present setup, that's since 1973, you can't [R. 984] meet, negotiate with the individual faculty member? You can't meet and negotiate the terms and conditions of employment. Who is the official spokesman on campus for the faculty?

A. On campus the President of the local Faculty Association chapter.

Q. He is the official spokesman?

A. Yes.

Q. Do you take a minority or a dissenting viewpoint? Do you have any provisions for that?

A. One of the reasons—are you referring to the exchange of views?

Q. Anything. Exchange of views.

A. That's one of the reasons we have the special witness provision at the college. And indeed so that people may come to the meeting and express either pro positions or anti positions. So, an individual could come and ask to be a special witness and if accepted could present any position on the issues being considered.

Q. Could present the position. But, what if the position—assume that he presents a position that you can't really talk about under the Master Contract.

A. Now you're talking about negotiations?

Q. Well, meet, confer and any terms of conditions of employment and so on and so forth.

[R. 985] A. We do not on the local campus have any authority to negotiate. Negotiations are handled through the System Office in St. Paul. I'm not sure if I understand the question.

Q. When you have the exchange of views, what are you doing there? Are you filling in the gaps of what is not covered in the Master Agreement?

A. To some extent that would be true. But, to a major extent, we exchange views on matters that pertain to the Administration and the operation of the college.

[R. 986] A. (continuing) To a great extent that would include educational matters.

Q. Can you promulgate without an Exchange of Views session as president?

A. In a restrictive sense, yes.

Q. But on a lot of matters you have to go through the Exchange of Views session for a rule?

A. We have such definite practices that I have a difficult time sometimes determining what's reasonable and what's practice. To a great extent in practice we try to exchange views on any matter. But, legally, I'm not sure.

Q. Prior to 1973, prior to the masters agreement, as an administrator you didn't have to go through the same setup that you do now, is that right? In other words, did you have these formal Exchange of Views committees setup?

A. We did not call them that. But, we had an internal government structure where we did, indeed, discuss issues before decisions were made.

Q. What was that internal government structure? Now, we are talking about pre 1973.

A. At Normandale we had what was referred to as a general faculty assembly. All full-time faculty members were members of the assembly along with all the administrators who were members of the assembly. So, the entire faculty and the entire administration would get together.

[R. 987] Q. How was that changed since the Masters Agreement?

A. Since the agreement there is a restriction in the contract on the number of individuals that can be on the Exchange of Views Committee.

(At this time a short recess was taken.)

By Mr. Fogarty:

Q. Mr. Lorenz, you were just going to explain the differences between the faculty governing setup that the Normandale pre 1973 and when the Masters Contract came in. Or, how it is today. What is that basic difference?

A. I mentioned that all the faculty members were members of the assembly, including all administrators. We had a committee structure. I served as the chairperson of that assembly. And then the recommendations that came out of the assembly—and this was operating by Roberts Rules which means there was, indeed, voting of all the faculty members and all the administrators would vote on the issues, make motions, vote on the issues. And then there would be recommendations to me and then I would make the decision on institutional position changes.

Q. And you were talking about pre 1973, right?

A. That's right.

Q. Okay. Therefore, anybody in the faculty or administration could get up and make a motion?

A. That's correct.

[R. 988] Q. There was no veto power? In other words, two people couldn't agree that this person could not speak at the faculty meeting?

A. That's correct.

Q. But, in today's setup, for someone who is not on the committee to get up and speak, there has to be an agreement between the administration and the representative from the committee, is that right?

A. That's right.

Q. So, in effect either the administrator or the other committee can block them today?

A. That's correct.

Q. So, that's a major difference, isn't it, as to how it used to be?

A. That is a significant difference.

Q. Significant difference. When the Masters Contract first came into effect, I believe there were some workshops conducted, do you recall that?

A. Yes.

Q. Briefly, what—how were those handled?

A. You are going to tax me now because that's a long time ago. I don't remember the sequence. We did—the administrators would meet with Mr. Helland and members of his staff. And we always had at least one joint meeting with the administrator and representatives of the faculty association on [R. 989] a statewide basis to discuss the provisions of the contract.

Q. Were those open meetings?

A. I was referring to statewide meetings. In addition to that we would have local meetings.

Q. Local meetings where you met with your people or where somebody from the state came down and met with your people? The administrative people.

A. Both.

Q. Both setups. Has that happened every time a new contract has come in?

A. No. You are referring to local meetings, now?

Q. Yes.

A. That has not happened after the last current contract.

Q. The current contract. If you need an interpretation of the contract, where do you go? Who do you contact?

A. I go to one of two people. Either the Chancellor or the Director of Personnel in the System Office.

Q. And do they—is that a formal type of communication or is it just a telephone call?

A. Not necessarily. Maybe just a telephone call.

Q. Does that happen frequently or occasionally or—

A. Initially frequently. Now, occasionally.

Q. The administration itself considers the association—I've already stated this, but I will state it again—the formal spokesman for the entire faculty?

[R. 990] A. By contract they are exclusive representatives of the faculty.

Q. Therefore, they are the spokesman of the official faculty position?

A. If I understand your question, the answer would be "Yes".

Q. Well, if you say, "I want to know the faculty's position on action X." Then the word of mouth coming from the Minnesota Community College Faculty Association, whatever you hear from them, is the official position? Their official—the faculty's official position on action X?

A. Yes.

Mr. Fogarty: I have no further questions.

[R. 991] CROSS EXAMINATION

By Mr. Mueting:

Q. President Lorenz, have you ever met and negotiated individually with any faculty member concerning their terms and conditions of employment either before 1973 or after 1973?

A. Mr. Mueting, I have a little question with the word "negotiate". Certainly prior to 1973 the answer would be "Yes". But, we do make a distinction between—the word negotiate as I understand is exclusively the province of the Systems Office with the faculty. We exchange views.

Q. Prior to 1973 what would be the conditions under which you would meet and negotiate terms of employment with individual faculty members?

A. We had a tenure system. Reappointment system. They could clearly talk with individuals about whether or not they should be reappointed and whether or not they should be granted tenure. And that was done on an individual basis.

Q. So, when you're referring to terms and conditions of employment, you are still actually referring to the employment decision itself?

A. In that case, yes.

Q. In your present Exchange of Views situation, who can [R. 992] be a special witness?

A. Any faculty member. Any Administrator. A question has recently arisen on whether or not students can be special witnesses in the Faculty Association—in the exchange of views sessions. Prior to a couple of years ago they could be. Now, there's a real question on that. In practice what happens is that sometimes they are and sometimes they are not. But, clearly faculty and Administration are.

Q. So, any faculty member at Normandale Community College is eligible as a special witness in an Exchange of Views process at Normandale, is that correct?

A. That's correct.

Q. Is there any requirement that that person hold membership in the Faculty Association?

A. No.

Q. Has any faculty member requested to appear as a special witness in exchange of views and been denied that opportunity by either party?

A. Not that I recall.

Q. At least on the committees in which you served that's never happened, is that correct?

A. That's correct.

Q. Is the exchange of views process the only process in which you obtain information from faculty concerning the [R. 993] matters relating to the college?

A. No.

Q. How else do you obtain such information?

A. Clearly through the Administrative structure.

Q. Could you explain what you mean by that?

A. Well, we have three divisions. We have the Division of Instructional Services, Student Services and Institutional Services. Then we have a typical Administrative structure under those divisions and individuals are supervised and work —they work through these, the Administrative structure on a daily basis.

Q. So, information that is received comes to you through the Administrative structure from the faculty members, is that correct?

A. Faculty members work through Administrators generally. It certainly is possible for a faculty member to talk with me as an individual.

Q. Does that happen?

A. On occasion.

Q. Do you have any regularly scheduled forum or meeting with faculty members or other staff members at Normandale outside of the normal exchange of views process?

A. We have what's called President's lunches. Once a month I meet with the randomly selected group of students. [R. 994] The following month with classified staff. The following month with faculty. Those are open meetings not on the agenda but any individual can discuss anything that they would like to discuss at those meetings. This is part of our communications structure.

Q. Who selects the faculty members who will show up at these lunches?

A. These faculty members are selected by the Director of the College Center on a random basis and she retains those records.

Q. As far as you know is membership in the Faculty Association a prerequisite to a faculty member receiving an invitation to attend the President's luncheon?

A. Clearly it is not because the Director of the College Center does not know, I'm quite certain, which members are and which members are not members of the Union.

Q. In your dealing with faculty members, especially with regard to communications with faculty members, do you make distinctions between Association members—Faculty Association members that is—and nonmembers?

A. I do not know which faculty members are members and which are not. I do—I'm not aware of that in any systematic way. I do, however, become knowledgeable that some individuals are members. May I expand on that? We have what we call the general faculty meetings once a [R. 995] quarter. We have an Administrative-called general faculty meeting and those are primarily reporting sessions. Individual Administrators and faculty members participate in those sessions. This again is part of our communications structure.

Q. What is your practice with regard to meeting with individual instructors who may wish to meet with you?

A. I meet with them.

Q. Have you ever refused to meet with the faculty member who's wished—requested a meeting with you?

A. I don't recall ever—obviously there would be times when I couldn't meet at the present time. But, we could set up another appointment.

Q. Are you familiar with the Plaintiffs in this case? The ones that are—

A. Plaintiffs from Normandale?

Q. Yes.

A. I'm familiar with the names of three.

Q. What are the three names that you—

A. Terrence Florin. James Wallace. Gary Nelson.

Q. Are you familiar with a Mr. Lievense?

A. Yes.

Q. Have you ever met privately with him?

A. Yes, I just did a few minutes ago, in fact.

Q. Prior to just a few minutes ago had you met with him?

[R. 996] A. Yes.

Q. And have you ever advised any Plaintiff in this case or any faculty member that they cannot discuss with you any matter that they wish to discuss?

A. No. The answer would be no. However, once we get into a discussion I may say it's more appropriately discussed in another forum. But, I wouldn't even know how to keep people from discussing something that they would want to discuss.

Q. Have you ever advised any of your administrators that they cannot meet with faculty members to discuss matters which the faculty member might wish to discuss?

A. No. However, there we do have clearly a structure and an understanding of where particular issues are discussed. I mean, I'm not sure that I'm giving the right impression. We don't discuss every matter at the college on an individual basis. Anyone that wants to come in and discuss this—I think it's a fairly good understanding of where particular items and issues are discussed. But, clearly I have never given any advice to an Administrator not to discuss an issue of importance to a faculty member. But, I do know that they might refer them to an appropriate place and it will be discussed within that place before a decision is made.

[R. 997] Q. Was there some confusion after the initial master contract was signed in 1973 with regard to who could speak to who about what?

A. Very much so.

Q. Could you explain that confusion?

A. We had both government structure and administrative structure that was not particularly compatible with the structure that came through the contract and also considerable confusion on what terms meant. And did it mean that when you exchanged views you could only discuss items in exchange of views sessions. Did it mean that when one member of the unit could not supervise people of the unit that they couldn't work with them on cooperative basis. So there was considerable confusion at that time and it had a real impact on the operation to come.

Q. Has there been in your impression and based on your experience has there been a lessening of that confusion from '73 to present?

A. Yes.

Q. Have the informal channels of communication been open to faculty members more so in the later years than in the years directly following the signing of the first master contract?

A. Yes.

[R. 998] Q. I've got one more question and getting back to the area of special witness. Are there some restrictions on what a special witness might say at an exchange of views process or subject on which that special witness might address?

A. No.

Mr. Mueting: I have no further questions.

Mr. Goodwin: No questions.

REDIRECT EXAMINATION

By Mr. Fogarty:

Q. Mr. Lorenz, at an exchange of views session you have representatives from the faculty and the administration, right?

A. Yes.

Q. You have faculty members, administration members, they make up the body of the committee?

A. In the present structure, that's correct.

Q. In the present structure now if anybody from the faculty side wants to get up and speak he can speak, can he?

A. If accepted by the special witness.

Q. If they have been accepted as a special witness. How about members of the committee?

A. I'm sorry, any member of the committee.

Q. I'm talking about members of the committee.

A. Certainly.

[R. 999] Q. Faculty association members can get up and speak?

A. That's right.

Q. On the other side administration members can get up and speak as well?

A. Okay.

Q. Is that right?

A. We do have some structure in terms of sharing, recognizing that type of thing.

Q. Other than the rules of order?

A. Okay.

Q. But as to the special witnesses, everyone could be a special witness, everybody in the faculty has the possibility of being a special witness, is that right?

A. That is correct.

Q. And on the other hand the committee also has the power or at least one side of that committee has the power to make sure nobody from the faculty other than the people that are on that committee and those appear as a special witness, is that right?

A. That's correct.

Q. When you said exchange of views, when people, when faculty members come in and talk to you, and obviously you're not going to show them out and say get out, but you brought this up yourself, you may say there is a more appropriate form. In other words, discuss it, you will [R. 1000] listen to them certainly and your response may be there is a more appropriate form for this, is that right?

A. That is correct.

Q. From their point of view at least the discussion may not be meaningful because you cannot afford them the remedy they are looking for, is that correct? In other words, they'll have to go to the form that the problem form?

A. I think I can answer, yes, to that if I understand. Certainly I can come up with these, very true.

Q. Giving you an example, if a person comes in today and says, "I want to discuss tenure with you," you could do that prior to 1973, couldn't you?

A. May I say we do not have tenure.

Q. I realize that, now that you don't have it you can't discuss it.

A. That's right. I can say you're instantly tenured.

Q. Or on the other hand tenure in the traditional sense is no longer existant.

A. That's right.

Mr. Fogarty: I have no further questions.

Mr. Mueting: Just a couple questions in response to a question concerning exchange of views.

RECROSS EXAMINATION

By Mr. Mueting:

[R. 1001] Q. I believe there was a situation that only members of the faculty association may speak at an exchange of views, is that correct, only faculty association may speak on an exchange of views of were you referring to members of the formal exchange of views committee?

A. Would you repeat that question.

Q. There was a reference in a question by Mr. Fogarty concerning exchange of views committee. I believe he indicated that faculty association people were the only ones entitled to speak by right. Is it your understanding that only members of the committee, exchange of views committee, be they faculty or nonfaculty association, are the ones entitled under the contract to speak at those exchange of views committees?

A. Mr. Mueting, under the contract there is a limited number of faculty members and administrators who can be on the committee. The contract itself does not speak to other people coming in and providing input. An exchange of views session at Normandale is for people to come in and provide input to the faculty members and administrators who serve as exchange of views members.

Mr. Lindquist: I understood, Mr. Mueting, that they were speaking about members of the [R. 1002] committee.

Mr. Mueting: Okay, fine.

By Mr. Mueting:

Q. Is it your practice to ignore faculty members points of view or statements to you if they are not expressed to you in the proper form?

A. No.

Mr. Mueting: No further questions.

Mr. Lindquist: Very well, Dr., thank you.

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* * *

[R. 59] Q. When you were at Willmar Community College how did you communicate, if at all, with the Administration?

A. We had general faculty meetings regularly at which discussions would take place and votes taken. We had various committees in which people who were elected by the faculty would debate and come to a position on the issues.

Q. Who would call these meetings?

A. Whoever the Chair of the Committee was.

Q. Well, who would call the faculty meetings?

A. The general faculty meetings were called by the President of the college.

Q. What was the purpose of these faculty meetings as far as you recall?

A. To discuss college policies, to establish academic standards, final academic standards, to determine degree requirements; the typical decisions that the academic faculty would make at a college.

Q. What were the topics that were taken up by committees that you were on?

A. Well, the Curriculum Committee would be the first sounding board for curriculum decisions. The Student Affairs Committee would be the first sounding board for decisions on what activities. The budget for the [R. 60] students activities.

[R. 61] Q. (by Mr. Swenson continuing) Did your English Department have a representative on each of these committees, or how did that work?

A. I don't recall whether each department was represented or whether we were elected from the school as a whole. I don't recall that.

Q. But there was representation?

A. Yeah.

Q. There was a representation system of some sort?

A. Yes.

Q. Was an opportunity to be elected to those committees open or closed?

A. No, it was open.

Q. By open, I mean it was open to anyone, is that the way it was?

A. Everyone on the faculty was eligible.

Q. Okay. And is this the avenue that you used to communicate department viewpoints to the administration?

A. Yes.

Q. Did you have the opportunity to get, as an individual teacher, to the administration and deal with them individually?

A. Yes.

Q. Was all of this communication activity that we are trying to describe necessary for some particular purpose?

[R. 62] A. Well, yes, I think so.

Q. What was the need?

A. I think it's very important at a college for there to be different forums where the individual faculty members can express opinions and have some input into the decisions that are being made in terms of the academic standards, degree requirements, curriculum, and so on.

Q. Why is this important to you as a college instructor?

A. I think it's important as a professional instructor that I have some say in terms of the structure of the system of my profession. I think it's important.

Q. Well, what does it do for your profession to be able to have this communication?

A. It helps give me a broader view in terms of the functioning and activities of the entire college, the entire institution. It helps me have some say on terms of what the instructor and requirements for the entire institution would be.

Q. All right. What are some of the issues that you needed to have an opportunity to talk about to the administration?

A. I needed to have some say in terms of what the requirements would be in order for a student to get a degree from my college. I needed to have a say in what the grading standards would be in terms of whether a student was a student in good standing or whether it—being flunked out [R. 63] of school, an honor student and so on. I needed some say in terms of the various curriculum programs even outside my own division for balance for the entire college.

Q. Now, let's move on to North Hennepin Community College for a moment. Why did you move from Willmar to North Hennepin?

A. North Hennepin was a new college. It was—it provided me an opportunity to get in on the ground floor of a new institution, and that's always exciting. The President of Willmar Community College was moving to be the first President at North Hennepin Community College and he specifically asked me if I would go with him and I said, "yes."

Q. Who was that President?

A. Dale Lorenz.

Q. Did you start working at North Hennepin, then, in September of 1966?

A. Yes.

Q. Where is North Hennepin located?

A. It's located in Brooklyn Park.

Q. Has it always been there?

A. No, the first few years was in Osseo in a temporary building.

Q. Did you have any involvement with teacher organizations when you—or as of September of 1966?

[R. 64] A. Yes, we established a chapter of the Minnesota Community College—or at that time Minnesota State Junior College Faculty Association at North Hennepin very quickly after the opening of school.

Q. All right. Could you describe what you did or what the process was in establishing this organization?

A. There were two of us who had been members of the Association before at other Minnesota Community Colleges, Neal Sands (phonetic) and I, and we took the lead, told the other people on the staff about the faculty association, and generally encouraged their memberships, and a number of people joined.

Q. Did you create any formal structure as between the teachers and the administration?

A. Yes. Another thing that we did is the first day that North Hennepin was in session, we adopted the Willmar Faculty—or the Willmar College Constitution as an interim constitution for the College until we could write our own college constitution. So we adopted the Willmar Faculty Constitution.

Q. Now, you say you did this on the first day of that school year?

A. Yes.

Q. Was there some urgency for doing it right away?

A. As far as I was concerned, there was some urgency, yes.

[R. 65] Q. What was that?

A. At any new institution there is always tensions and—well, tensions, and just the establishing the relationships and the structure of the institution. There were two colleges that had been formed, Anoka-Ramsey and what is now known as Minneapolis Community College, and some of the tensions that were present at those particular colleges, I thought, could be avoided if the College—if North Hennepin College started off with a general faculty constitution that would essentially define the relationship immediately between the administration and the faculty members.

Q. What definition was given to that relationship?

A. We established, for example, Academic Standards Committee, Curriculum Committee, the different divisions within the college, things of that nature.

Q. What was the purpose of these committees in the structure?

A. So that the faculty and the administration would know right from the very beginning how to go about making curriculum proposals, establishing academic standards, to give a structure where there would be structural forums within which individual faculty members could have a say, that they could be confident would be heard, and I think it was successful.

Q. Was your objective to give this opportunity, this forum opportunity, to all faculty members?

[R. 66] A. Yes.

Q. I mean, were there any faculty members who were for some reason excluded from this forum situation?

A. No, no.

Q. Was there any reason why you did not try to exclude anybody?

A. It just never ever occurred to us that anybody should be excluded.

Q. Well, is there some reason why everybody should be included?

A. Yes, just the nature of a college, that all of the faculty and staff members should be included in the forums where decisions are made.

Q. Now, in this structure that you developed in 1966, was there a division chairman arrangement or department chairman arrangement created?

A. In the first year there were only one—that was the English division—because as a first-year college we knew that virtually all of our students would be freshmen and the freshman English requirement is a big one in a community college so we only had one division named as such at the beginning of the year. During that first academic year, then, other divisions were named and defined during that first year.

Q. All right. Were you chairman of the English Department?

A. Yes.

[R. 67] Q. What were your duties as chairman of the English Department?

A. My primary duty was to recommend to the administration people to be hired that would be added to the English staff. Now, that was the first duty that I had. And then we also had—I also had the requirement as Division Chairman to take the lead amongst the new English instructors in deciding what the English curriculum should be.

Q. Now, you might address this answer as well as the remainder of your answers to the Special Master on the question of whether your duties involved teacher evaluation?

A. Yes, to a certain extent. The evaluation was essentially voluntary, that no—every instructor would be evaluated, but no instructor would have to be evaluated by me if he thought that I would discriminate against him in that evaluation. So each English instructor could say, "In my evaluation, I would prefer that Mr. Knight not be part of my evaluation team."

Q. How many members of a department made up an evaluation team?

A. It took a couple years for the thing to settle down, but as I recall it, that each instructor could select a three-person committee to do the primary evaluation.

Q. What was the object of the evaluation effort?

[R. 68] A. To make sure that the person could function effectively as a permanent employee within the structure and programs at North Hennepin College.

Q. Would a favorable evaluation ultimately lead to tenure status?

A. Yes.

Q. Is that tenure arrangement still in effect at North Hennepin?

A. No.

Q. Do you know when the tenure arrangement ceased?

A. When the first master contract—I think it was in 1973—was published, all mention of tenure had been eliminated.

Q. Okay. Now, did the English Department have a representative on any other organizations on the campus, that is to say was there a faculty senate?

A. Not the first year. After a couple of years, I forget the exact date, the faculty senate was established and we did have an English representative on the faculty senate.

Q. Okay. Now, who was eligible in the English Department to be a representative to the faculty senate?

A. Anyone.

Q. Did the person have to be a member of the teacher organization?

A. No.

Q. Was the teacher organization called the Minnesota Community [R. 69] College Faculty Association in 1973—I'm sorry, in 1966, I guess it would have been.

A. It was Minnesota State Junior College Faculty Association, but it's the predecessor to the Community College, just a change in the name.

Q. When did the change in name occur?

A. I don't recall now. I don't recall.

Q. You don't even have an approximation?

A. I'm sorry.

Q. All right. Now, was there any restriction on who could become a member of the Junior College Faculty Association?

A. No.

Q. I mean, other than I suppose you had to be a member in the—a teacher in one of the colleges?

A. Yeah.

Q. But was there any restriction other than that?

A. No.

Q. Was membership in the Association voluntary?

A. Yes.

Q. Did you have Association dues?

A. Yes.

Q. Were all faculty in the Community Colleges required to pay money to—dues or money to the Association?

A. No.

Q. Okay. Where would the Association gets its financial [R. 70] resources?

A. From the membership fees of the voluntary members.

Q. I see. There was no fair-share fee or anything like that?

A. No.

Q. Now, do you still have the division chairman concept at North Hennepin?

A. No.

Q. Do you know when that concept ceased?

A. With the institution of the first master contract in 1973.

Q. Did the master contract call for a discontinuation of the division chairman concept?

A. The master contract specified that no member of the bargaining unit could be in a supervisory relationship with anybody else in the bargaining unit, and since the chairman of the divisions were faculty members who were members of the bargaining unit, they could not supervise other members within the bargaining unit, so their position became irrelevant.

Q. Was there a need for a department chairman?

A. I think there is.

Q. What is the basis of your thinking that?

A. The division chairman where the members of the division essentially elect their own chairman provides a direct and democratic access to decisions that are very important for members of the division to make within the academic [R. 71] institution.

Q. Okay. Now, let's move to the faculty senate that existed at North Hennepin Community College. I would like to have you tell the Special Master some information about that. For example, who made up the membership of the faculty senate?

A. The faculty senate had three automatic members: That was the President of the college, the Academic Dean of the college, and the Dean of Students. Each division had a representative, academic division, and then there were several members who were elected at large. In the at large election every member of the academic community including the administration could vote for the at large members.

Q. Did the faculty senate have committees?

A. Yes.

Q. Do you recall the names of those committees?

A. Not all of them, but I know that there was a Curriculum Committee and an Academic Standards Committee. Beyond that, I'm not sure.

Q. What did the Curriculum Committee do, if you know?

A. The Curriculum Committee evaluated curriculum proposals that came from each separate department to determine how it fit in the overall curriculum program of the college, it evaluated new programs in case a new—totally new [R. 72] program, rather than just individual courses, was to be introduced. It would also, then, consider courses that had become obsolete, and there was a procedure for eliminating courses that were no longer beneficial.

Q. Who could submit proposals to the curriculum committee?

A. Any members of the faculty.

Q. Did the proposals have to come to the committee from the division, or could an individual submit a proposal?

A. An individual could submit a proposal. The typical way of doing this was to take it before the division, get a positive recommendation from the division before sending it on, but it was not required that it had to be done that way.

Q. Who among the college could attend a meeting of the Curriculum Committee?

A. Anyone.

Q. Was there any restrictions on who could argue for or against a particular curriculum proposal?

A. No.

Q. What did the Academic Standards Committee take up?

A. Academic Standards Committee took up such things as degree requirements, what a student would have to do in order to qualify for the various degrees at our college, what the procedures were for suspending students who did not keep their grades up to standard, and the review [R. 73] process for those students who were placed on probation or notified of suspension in case the student wanted to have that particular status reviewed. That was it, essentially.

Q. In your professional judgment were the standards maintained by the academic standards committee academically stronger or weaker than they are now?

A. Oh, I would say stronger.

Q. In what respect?

A. I am not sure right now that it is possible to flunk a student out of college, of suspending a student for poor grades. I am not aware of any procedure where that is now possible.

Q. Was that possible under the Academic Standards Committee structure?

A. Yes.

Q. Any other differences that you are aware of?

A. I am not sure now how degree requirements are determined. I don't know how that is done now.

[R. 74] Q. Who could attend the Faculty Senate meetings?

A. Anyone. When I say "anyone" any of the faculty members.

Q. Was there any restriction on who could enter into the debate on a particular proposal or issue that was before the Senate?

A. No, not that I am aware of.

Q. Are you aware that there were any restrictions on faculty members' opportunities to arrange for meetings with the

administration on an ad hoc basis regarding some aspect of college policy?

A. No, I'm not aware of any restrictions.

Q. Now, you had involvement with both teacher organizations; the State Junior College Faculty Association and involvement as a faculty member on the campus of North Hennepin Community College, is that correct?

A. Right.

Q. Now, as to teacher organization aspect, you mentioned that you were the President of the State Junior College Faculty Association. Were you ever in an office-holding position at North Hennepin Community College, that is as to the teacher organization?

A. No, except being a Delegate to the State Conventions of the Faculty Association.

Q. Now, what was the relationship between the faculty organization at North Hennepin Community College and the [R. 75] State faculty organization?

A. I am not sure I understand your question. You mean the faculty—the general faculty organization on the local level or the faculty organization on the local level?

Q Let me just get to this point, whether or not North Hennepin was a local or a chapter of the State organization?

A. Yes.

Q. And were there chapters on each of the other campuses?

A. Yes.

Q. Approximately how many campuses were there at the time?

A. I'm not exactly sure, 12 or 14, something like that.

Q. Now, the Minnesota State Faculty Association, that is, the Statewide organization, was sort of an umbrella, ap-

parently for the faculty on each of the campuses. Did that organization engage in collective bargaining?

A. No, no.

Q. Was there any part of the State Junior College Faculty Association that engaged in collective bargaining?

A. Well, again, I'm not exactly sure, you know, how to answer that because the Faculty Association on the State level represented the various chapters to the Community College Board and to the State Legislature but we did not negotiate and get involved in collective bargaining as defined by the 1973 law. So we represented [R. 76] them but I don't think it would be accurate to say we participated in collective bargaining.

Q. Now, in your capacity as President of the State Faculty Association, do you know or did you know whether there were local faculty organizations on each of the college campuses in the community college system?

A. Yes, there was local chapters on each one.

Q. Each one had its own President and Secretary?

A. Right.

Q. And that sort of thing?

A. Yeah.

Q. Did they have their own constitutions?

A. Now, I'm not sure that each college had its own constitution.

Q. Did the State organization have a constitution?

A. Yes, the State organization had a constitution.

Q. Did that apply to all of the community college campuses?

A. Yes.

Q. Now, was the Faculty Senate an entity that emanated from any bargain agreement that had been entered into be-

tween the Faculty Association and the State Board for Community Colleges?

A. No.

Q. Was there a Master Contract of any sort for the community college faculty prior to the spring of 1973?

[R. 77] A. No.

Q. So all of this organization that we have been talking about, would it be correct to say, is a product of the collective minds of faculty and Administration and it was not born out of some negotiation process, is that correct?

A. Right.

Q. When the Faculty Senate debated a particular issue what would it do with the issue then? Was there a vote or what was the process?

A. Yes, there was a vote. All members of the Faculty Senate would vote on it, including the President, who is an automatic member. Then after that debate and the vote then the resolution or whatever it was that was passed, then was given to the President as the President. Then he could accept it or reject it, but the Faculty Senate was the forum within which the President and the other Administrators would debate as equal colleagues with the other members of the Faculty Senate.

Q. Was there any opportunity for the classroom instructors who were not members of the Faculty Senate to enter into that debate in some kind of a regular formal way?

A. The primary way was that all the resolutions and motions passed by the Faculty Senate could then be brought up for debate and further review by—at a general faculty [R. 78] meeting. So if the general faculty did not approve of something that the Senate did there was then further review process at the general faculty meeting.

Q. Did the Senate make any efforts at all to let the faculty know in advance of a vote or in advance of a meeting?

A. Yes.

Q. On a particular proposal?

A. Yes.

Q. What the proposal was?

A. Yes, with each academic department having a representative who is most common for that department representative to sound out the other members of that particular department and that person would generally go with "an academic consensus" how the members felt about that issue.

Q. So there was a department meeting on that department issue?

A. Yes, though it would not have to be necessarily a formal meeting where we are going to bring up this up. The Senate member would often go up and down the hallways knocking on different office doors asking how people felt about this, if there was not time to bring it up at a regularly scheduled meeting.

Q. Did you do this kind of going up and down the hall in [R. 79] your capacity as Chairman?

A. Yes.

Q. Were these proposals put in writing and disseminated?

A. Yes.

Q. Or how were they handled?

A. Yes, they were normally put in writing and proposals were sent out to all faculty members in advance of the meeting where the vote would be taken to decide.

Q. But ultimately it's the Administration who has to make a decision on implementing a particular idea, is that correct?

A. Right.

Q. Did a vote taken by the Faculty Senate foreclose further debate on the particular issue?

A. Normally, yes, unless it was brought up before the general faculty.

Q. Could an individual go directly to the President of the college and express his view to the President on the action that the Senate had taken?

A. Oh, yes.

Q. Were there any restrictions on that at all?

A. No, no restrictions.

Q. Now, I want to move to your involvement at the level of Minnesota Junior College Faculty Association. What years or what period of time is it during which you [R. 80] were President of the Faculty Association?

A. I was President during 1968-69 school year.

Q. Did you continue to teach during that period?

A. I taught part-time and part of my duties were devoted to being President of the Association.

Q. What duties did you have as President of the Association?

A. Represent the members of the organization at the Community College Board and to be involved in political action so that we could get the best possible favorable treatment by the State Legislature.

Q. Did you lead the Faculty Association in any collective bargaining?

A. I represented the faculty in terms of the presenting of issues; but again it would not be fair to characterize that as collective bargaining, as collective bargaining has been defined by the law in 1973.

Q. What distinctions would you make between what you were doing and what you believed this 1973 law set up?

A. One is we didn't have a Master Contract. There were a series of State Junior College Board policies that we had a direct say in the establishment of. For example, the tenure policy. We did not specify in terms of any contract what the salary schedule would be. We dealt with the State Legislature in those determinations. So everything was not just spelled out in black and white [R. 81] and writing the way it is with the Master Contract.

Q. Now, you have referred to a 1973 law. Could you identify what law you are referring to?

A. I'm not sure of the exact number. I simply think of it as the Public Employees' Negotiation law. I'm not sure if there is a more accurate name for it or not.

Q. Well, have you heard the term Public Employee Labor Relations Act?

A. Yes.

Q. Would that be the law that you are referring to?

A. Yes.

Q. Now, after 1969 you were no longer President of the State Faculty Association?

A. Right.

Q. Did you continue to be a member of the Faculty Association?

A. Yes.

Q. Did you have any particular involvement in the Association?

A. No.

Q. Either at the State or the local level?

A. Just the unofficial status that comes with being the immediate Past President of the Association.

Q. Did you have any duties that go with that?

A. None that I recall.

Q. Now, you still have the Faculty Senate at North Hennepin [R. 82] Community College?

A. No.

Q. You have testified that you do not have the Department Chairman concept anymore?

A. No.

Q. When was the Faculty Senate concept done away with at North Hennepin?

A. At the advent of the first Master Contract in 1973.

Q. Now, do you know, was this a Contract that was negotiated pursuant to the Public Employee Labor Relations Act?

A. Right.

Q. I'm going to refer to that act from now on as simply PELRA. Do you know whether there were Faculty Senate on any of the other college campuses?

A. I don't really know.

Q. Now, 1973, and as I take it, this is apparently in the spring of 1973. What exactly happened that did away with the Faculty Senate?

A. When the first Master Contract was negotiated it eliminated reference to anything like Faculty Senate. So the Contract did away with it.

Q. What was installed in place of the Faculty Senate?

A. Faculty Association Meet and Confer Committees.

Q. Okay. Now, going back to the Board from 1966 at North Hennepin to the Board up until the spring of 1973, what [R. 83] was the relationship between the teachers and the Administration in terms of their working relationship? How would you describe that?

A. I would describe it as a relationship of collegial equals. I think that would be the fairest way of describing it.

Q. When you say "collegial equals" what exactly does that mean? What do you mean when you use that term?

A. When I use the term I mean that's something like the Faculty Senate meetings that an individual member of the Senate could debate and discuss as an equal with the President of the college who is right there. At the general faculty meetings we could discuss and debate as equals and that the President of the faculty—I viewed the President of the faculty as the first name among equals rather than as the superior, as the boss.

Q. Was the relationship between the teachers and the Administration essentially a cooperative one, would you say that?

A. Yes, I believe.

Q. All right. Now, what is your view of the—let's say the merits of the Faculty Senate as opposed to the merits of the Meet and Confer Committees that now exist?

A. Well, the merits, from my point of view, is whether I was a member of the Senate or not I could have a say [R. 84] in who the members were. I could vote on the English Department representative as well as at-large representatives, that I could have not only a say of the membership, but I could have a forum which I could express my views on various matters. It was acknowledged that it was my right as a faculty member to do that. Those are the chief advantages that I can see to the Faculty Senate as contrasted to the Meet and Confer Committees where I have no say in who the membership—who the members are of those various committees. I have no forum within which to express my opinions in a systematic way.

Q. Why not?

A. Because the Master Contract doesn't allow me to.

* * *

[R. 100] A. With the Faculty Senate and its related committees before 1973 I could either actively present myself as a potential member of any of those committees and if I had

enough votes I would be elected. I could vote on those other people who had served on the committees. I could have a forum even if I wasn't a member of the committee to go and directly present my views. With the Meet and Confer Committees I cannot present myself as a member. I cannot have any say in who are the members. I have no forum within which to present my views.

Q. Can you speak directly with the College President, or the Dean of Instruction on a question of college policy or curriculum?

A. It depends on whether you mean the question in a practical effective way as part of the official structure or whether, you know, I can talk to the President as we are walking across campus. Of course, I can talk to him, but if I were to say "President, my position on a curriculum matter," or even make a curriculum proposal directly to the Administration, the Administration head would kick it back to the Faculty Association Committee anyway. So if I chose not to deal with the Faculty [R. 101] Association Committee I could not circumvent the control that the Faculty Association Committee would have over my curriculum proposal.

Q. Do you feel that the President of your college or the Academic Dean at your college has his door open to you at any time on any subject?

A. I can walk in and talk with him. There is no problem with that. So, yes I can talk with him.

Q. Can you talk with him for the purpose of effectively influencing his decisionmaking?

A. No, I think I do not have any effective influence on any policy at all.

Q. Why is that?

A. Because we have no forum within which I can present my views effectively. There is no general faculty meeting, no Faculty Senate, no Division meetings as such.

Q. Let's go to your particular Division. You are still a member of the English Division of North Hennepin Community College, right?

A. Yes.

Q. Do you have Division meetings at all?

A. Only those that are called by the Administration.

Q. And what is done at these Division meetings?

A. We may find out what the general program that will be presented for the following year in terms of scheduling [R. 102] is; to find out generally what the budget might be that would be available for various individual members of the Department.

Q. Now, at these meetings called by the Administration do you have an opportunity to try to persuade or influence the Administration's decisionmaking on a particular issue affecting the Department?

A. I would say that with the exception of maybe changing a class schedule slightly, say from Tuesday night to Wednesday night, that with the exception of things like that that the decisions are pretty well presented to us as the decisions that have been made. If I don't like the amount of money that I'm going to get for hiring guest speakers in a class it is simply presented to me "This is how much you are going to get".

Q. Would you have had a greater opportunity to influence that Administration decisionmaking prior to the spring of 1973?

A. Yes.

Q. Did you in fact engage in that kind of dialogue with your Administration?

A. Yes.

Q. Now, what is it that has eliminated that opportunity in your Department now?

A. Well, the Master Contract has eliminated Division [R. 103] Chairman. I don't have anybody there speaking for me when the budgetary decisions are made.

Q. But what is it that prevents you from, at one of these meetings of the English Department called by the Administration, what prevents you from trying to influence the Administration's decisionmaking at those types of meetings?

A. The decisions have already been made at that time. They are not tentative decisions. They are presented. This is how much you are going to get. So at the end procedure before the decision is made, I have no opportunity to get involved in that now. Before 1973 I did because the Division Chairman sat in at the meeting when those budget decisions were made.

Q. Who makes the decisions?

A. In terms of budgets?

Q. No, who makes the decisions that ultimately become Administrative orders?

A. Well, I assume that some of those things come up before the Meet and Confer Committees, before the Administration reached their decision.

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[R. 111] Q. (by Mr. Swenson continuing) Now, then, Mr. Knight, when you have a proposal for a new course who do you submit that proposal to in order to try to get it implemented in the college?

[R. 112] A. Since 1973 I haven't submitted any proposals for new courses.

Q. Why not?

A. Because any proposal that I would submit would have to go before a Faculty Association Committee.

Q. Do you have opportunity to evaluate the administration?

A. No.

Q. How is that done presently?

A. I do not know.

Q. How was it done prior to the spring of 1973?

A. There was different—there were different procedures followed. The one I remember was simply the administration asking for the different division chairmen to respond to how the administrators were doing, and through the division chairmen, then the faculty had a chance of expressing their opinions about the effectiveness of various administrators.

Q. Do you have an opportunity to evaluate your colleagues presently?

A. No.

Q. Was this evaluation process done under the tenure evaluation that you described before?

A. Yes. Up till 1973 we had tenure evaluation.

Q. Now, I would like to ask you to state for the Court what you regard as the duties or activities you should [R. 113] perform in your job as a professional educator.

A. What I should perform in my job as a professional educator, first of all, there is selecting the course material and outlining the courses for my specific courses and my students. I should be able to have a say in what the academic standards are for the college as a whole, what the overall curriculum program is for the college as a whole, and what the general academic atmosphere would be around the college. I should have a say in who the people are who are permanently added to the faculty in the form of tenure, and I should have a say in who my direct supervisor would be. Those are the things, primarily, that I should be able to do.

Q. What about evaluation of students?

A. Yes.

Q. Is that part of your tasks?

A. That would be part of the course activity.

Q. How about evaluation of the courses that presently exist, is that a part of your duties?

A. It is not now.

Q. Well, I mean, should it be?

A. It should be. It should be.

Q. And of course, you should be responsible for teaching in the classroom?

A. Oh, yeah.

[R. 114] Q. Now, of the activities that you claim should be a part of your job, which of those activities are, in fact, a part of your job right now?

A. Selecting my course material, teaching my classes, evaluating my students.

Q. All right. Now, you have excluded participation in determining academic standards, determining the general curriculum for the college, determining or influencing the general atmosphere of the college, establishing tenure for faculty, determining hiring of administrators and evaluation of courses and that sort of thing. Why do you not participate in those activities if you believe they ought to be a part of your work?

A. I am prevented from doing it by the Master Contract.

Q. How does the Master Contract prevent you from doing these things?

A. We have no tenure. I am not allowed to serve on Curriculum Committees. I have no say in the process of hiring administrators. Those things have been eliminated.

Q. How could you become a member of a Meet and Confer Committee?

A. I would have to become a member of the Faculty Association and then present myself, I assume, to the Association Membership for election on a Meet and Confer Committee. But I would have to become a member of the Faculty [R. 115] Association.

Q. Now, as to the list of activities that you claim should be a part of your job, were those activities a part of your job prior to the spring of 1973?

A. Yes.

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[R. 133] Q. Now the freedoms that you retain in the present system include many freedoms, do they not?

A. You will have to be more specific than that?

Q. Okay. You can speak directly to high-ranking Administration officials of the college and you have done so on any number of subjects?

A. Yes.

Q. You can speak directly to low-level administration officials?

A. Yes.

Q. Regarding any number of subjects?

[R. 134] A. Yes.

Q. And you have done so?

Q. You can certainly petition the Legislature on any subject that suits your desire, isn't that correct?

A. I assume I can, sure.

Q. John Helling, the President of North Hennepin, by the way, is he still the President there?

A. Yes.

Q. He has never said to you that "I can't talk to you because you are not a part of the exclusive representative"?

A. No.

Q. And in your own mind being able to talk to the Legislature is very very important because not one penny comes from the Minnesota Junior College Faculty Board?

A. Right.

Q. It all comes from the Legislature?

A. Right.

Q. And that's the most important forum for money for that organization?

A. Yes.

Q. And there are absolutely no restrictions on your power to petition the Legislature?

A. No, there is no restriction.

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[R. 148] Q. Mr. Knight in Direct Examination today you testified that you were not free to engage in some of the activities that you had engaged in before such as making recommendations regarding contents of setting a course, setting up a course, do you recall that?

A. Yes.

[R. 149] Q. Would you tell us upon what basis you make that decision and what authority you have for the proposition that you are not free to do that?

A. I don't understand your question.

Q. I understood your Direct Testimony this morning to be that you felt you no longer had the freedom to recommend courses that might be taught or courses that should be offered.

A. Okay.

Q. Do you feel you have that freedom at the present time?

A. No, I do not.

Q. Okay. What authority do you base that opinion on?

A. Because the Master Contract says that all of my curriculum proposals would have to go through a Faculty Associa-

tion Committee, and that I find totally offensive because I have no say in who is on that committee. So it's the structure is offensive to me as a professional teacher.

Q. So as I understand your testimony, it's not that you don't have the power to do that, it's just that the procedure is offensive to you?

A. Yes, the structure is offensive. That's what I'm getting at.

Q. But you do have the power to make recommendations on course work?

A. I have power to make recommendations to an organization [R. 150] that I am trying to face in Federal District Court. I do not trust the—my opponents in a lawsuit to watch out for my best interests in curriculum matters.

Q. What authority do you have for the proposition that the decision on curriculum is going to be made by anyone other than the administration ultimately?

Mr. Swenson: Your Honor, I think that question calls for a legal conclusion. I mean, when he is talking about authority, I don't know what he means by that.

Mr. Lindquist: I don't think this adds to the case. Objection sustained.

Q. You have indicated at the present time that you feel that you do have the right to select course material, teach classes and evaluate students?

A. Yes.

Q. And that some of the other rights that you described such as general academic atmosphere and that you should be able to evaluate the course matters, and others are rights that you don't feel you currently have?

Mr. Swenson: We are going to object as being a mischaracterization of this witness's testimony. He did not speak

of those things in terms of rights. He spoke of those things in terms of matters which he felt a necessary part of his doing a job as a [R. 151] professional educator.

Mr. Lindquist: All right. With that understanding, go ahead and answer.

A. All right. I don't remember your question relative to that.

Q. (by Mr. Goodwin continuing) Let me rephrase my question. As your Counsel has so eloquently put it, these are matters you feel are essential to the right kind of professional atmosphere?

A. Yeah.

Q. Reasonable minds can certainly differ on what is the right kind of professional atmosphere, isn't that correct?

A. Yes, okay.

Q. And other teachers have selected a different model than you would prefer, isn't that correct?

A. Yes.

Q. You have stated in your Direct Testimony that you have no option to avoid the Association other than to resign, isn't that correct?

A. Yes.

Q. You certainly have the option of seeking to have another exclusive representative certified, isn't that correct?

A. Yes.

Q. And that's an option that's available to any teacher, isn't that correct?

[R. 152] A. Yes.

Q. And you have the option with the current system of submitting your views on any subject to the college administration, isn't that correct?

A. I don't understand your question here.

Q. You have the option under the present system of submitting your views to the college administration, isn't that correct?

A. Now are you talking about a structure within which to do this, or just doing it as a casual citizen?

Q. You have the right as a teacher to submit your views to the college administration under the present structure?

A. Yes.

Mr. Swenson: We are going to object to that as calling for a legal conclusion again.

Mr. Lindquist: Well, he has already answered it. He said, "Yes."

Mr. Swenson: Do you have more to say?

The Witness: Yes, I do, because—

Mr. Lindquist: Go ahead.

The Witness: I have the right to do that, but there is no forum or structure where I can have any confidence that I will be heard or my views will be taken into effect as decisions are made. So as far as I can see, my presentation of any views that I have [R. 153] would not have any more effect than any casual citizen, and perhaps even less than some.

Q. (by Mr. Goodwin continuing) Nothing, of course, in the present system prevents you from calling a faculty meeting at any time you would like to do that?

A. I can't do that.

Q. You cannot extend out an invitation for a faculty meeting?

A. I cannot call a faculty meeting where we would discuss working conditions or conditions of employment or anything else like that. The contract prevents me from doing that.

Q. Have you ever tried to do that?

A. The Contract prevents me from doing that. The law prevents me from doing that.

Q. Have you ever tried to do that?

A. I have never tried to do it because it's against the law and the Contract.

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[R. 158] RECROSS-EXAMINATION

By Mr. Goodwin:

Q. Have you ever been told by any administration officer or precluded by any administration officer regarding expressing your views on any matter of concern to you?

A. No.

Q. Have you ever been told not to or precluded by any union official regarding expressing your views on any matter of concern to you?

A. No.

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[R. 169] Q. Do you recognize that as the Collective Bargaining Agreement that you are subject to presently?

A. Yes.

Q. Could you state how long you have been subject to collective bargaining contracts, whether this one or any others?

A. 1973 or 1974, the inception of the first Master Contract.

Q. And have all of these been negotiated by the MCCFA?

A. Yes.

Q. Have you had any opportunity to participate in their development?

A. No, I have had no such opportunity other than the opportunity of joining an organization which I refuse to do.

Q. Were you employed at North Hennepin before the first Master Contract came into being in 1973?

A. Yes, I was.

Q. You operated under the faculty senate concept that Mr. Knight spoke about yesterday?

A. That is correct.

Q. What is the difference in the way you operate as a professional teacher now as compared with prior to the first Contract?

A. I feel very strongly that when a professional educator, [R. 170] and I like to think of myself as such, is hired by a school district, or in my case the Community College Board or the State of Minnesota, that educator assumes an obligation to perform not only to his or her optimum capacity in the classroom, but to perform to his or her optimum capacity in the entire academic life of that institution. That was something which from 1967 to 1973 I seriously attempted to do. In 1973 and '74 I came to recognize that it was no longer possible for me to function in this way unless I joined a private organization that espoused views which I did not support, that operated in a fashion which I did not support and the connection with which I could—or the connection with which I saw in terms of its educational function to be a rather weak connection. I did not see it as an education organization, and as a consequence, even though it might be rather quaint to use the term, my conscience, my sense of what was right, my sense of what was appropriate made it impossible, literally impossible to voluntarily associate myself with the MCCFA, and

as a consequence, I have not been able to function in the fashion in which I seriously attempted to function from 1967 to 1973.

Q. I wonder if you could relate some specific activities that you engaged in prior to 1973 that you no longer engage in.

A. Oh, certainly. I was during 1968 and 1969 president of [R. 171] the North Hennepin local of the Minnesota Junior College Faculty Association, the old MJCFA which became the MCCFA. I was extremely active in that. I functioned as a member of and as chairman of the tenure committee which I considered to be a very genuine function. In 1968 and 1979 and again in 1970 and 1971—for the better part of 1970 and '71—I functioned as chairman of the English Division. They are just indications of the degree and extent of my involvement. I was faithful in attendance at all meetings of the Faculty Association. I attended voluntarily even though I never functioned as part of its meetings of the faculty senate. In other words, I was so involved that I wasn't really home all that much during that period of time.

Q. Was membership in the Minnesota State Junior College Faculty Association a voluntary membership?

A. Yes, it was.

Q. Was there—

A. Yes, it was.

Q. Excuse me. What were you going to say?

A. No, I just repeated it.

Q. Was there any requirement that non-members pay dues or fees to the Faculty Association?

A. No.

Q. That is to the earlier Faculty Association.

[R. 172] A. No, there was no such requirement.

Q. Now, I want to direct your attention to approximately the year 1973. In that year were you involved in a constitution committee?

A. Yes, that's true, I was. Mr. John Winkleman was president of the local association at that time. I was still a member of the organization and I asked him—I was not elected to the position, it's the sort of thing for which one volunteered—if I might serve on the committee that would be charged with the responsibility of drafting a local constitution to operate then within the framework of the new order or the Master Contract, and Mr. Winkleman then said, "Yes, you may serve on that committee." I volunteered for it.

Q. What was the outcome of the committee work?

A. Well, presumably the outcome of the committee's work was the formulation of a constitution. The outcome of the committee's work in terms of what I would have liked to have seen that committee do was not what I would have hoped.

Q. What did you—

A. Would you like to have me just relate all of this?

Q. Yes.

A. It was my hope. I had begun at that point to suspect that there would be very fundamental changes in the method of [R. 173] operation in the faculty senate concept in the sense of colleagueality, in the definition of faculty as being an academic community rather than as an adversary—two adversarial camps. I had begun to suspect very substantial changes would come to pass and I saw this constitution committee, then, as a very critical committee and whether my judgment was right or wrong, I went into that committee with the intention of preserving as much of the old sense of colleagueality, the old sense of the college as being an academic community as it would be possible for me to preserve. That was my intention.

I went into the committee and one of the first issues which I raised was the fashion in which individuals who were not members of the MCCFA—as I was at that time a member—would be granted representation on the executive board, the executive council—I do not recall precisely the name—but the central governing body of the MCCFA. I felt that it was critical that they be so represented by some proportional formula, and I posed that, and was met by Mr. Neil Sands who is a very strong faculty association person, a rather firm objection to that idea. It seemed to be the feeling of the activists in the MCCFA on the committee is that faculty members who were not part and were not part of the Union would not indeed be proportionally represented. And at that point I raised [R. 174] what was sort of my, if I may speak metaphorically, damascus role of experience, I said at what time—at what time does a person become a professional educator, when the Community College Board or when the State renders the judgment that you are acceptable? Am I a professional educator at that point or am I a professional educator when I join a group that purports to represent professional educators? When I join the Union do I become a professional then? And at that point Mr. Sands' response was, "You become a professional when you join the Union." And what happened to the Constitutional Committee after that, I really don't know because I did not attend any more meetings.

Q. Do non-members of the Union presently have representation on any of the faculty committees?

A. No.

[R. 175] Q. Now, are you required to pay a Fair Share Fee to the MCCFA?

A. Yes, I am.

Q. Do you know how much you pay.

A. It was $160 and some-odd cents during the last calendar year and it's gone up. It's gone up every year; but then I suppose is subject to inflation.

Q. So it was approximately $160 and—

A. $160 and some-odd cents during 1979.

Q. All right. And during 1980 do you know how much you paid so far?

A. I think I paid in excess of $125—$125-$135 to this point, but that's an approximation. I don't have my stub with me.

Q. Are you satisfied that the fee is in fact a fair fee?

A. No, certainly not. I believe that it's assessed now at 85 percent. If it's set at 1 percent its inconsequential, I would object to it regardless of the amount.

Q. Now, are you familiar with the exchange of views committees at North Hennepin Community College, that is, are you aware that they exist?

A. Yes, I'm aware of the fact that they exist.

Q. Have you ever sought membership on one of those committees?

A. Yes, I sought membership on both the curriculum and [R. 176] personnel committee.

Q. And when was that?

A. Really in this whole thing I should keep a journal. To the best of my recollection in '75 the Curriculum Committee in '76 in the Personnel.

Q. Were you successful in your attempt?

A. Well, the original announcement, you know, committees that are traditionally not growing very frequently. Anyone who has ever headed up a committee knows the joy of volunteering.

There was some initial joy when I volunteered. This May, it was discovered that I was unfortunately not qualified to serve on those committees—

Q. Why were you not qualified?

A. Because I was not a member of the Union.

Q. Is that what you were told?

A. That's right.

Q. And now, is there an Executive Committee under the Faculty Association at North Hennepin?

A. Yes, there is a committee now.

Q. Could you describe what the makeup of that committee is?

A. Yes. Since I was forced out of active participation in the affairs of the institution in 1973 and 1974 I have lost track of the changing terminology. So whether it is now an Executive Committee, or an Executive Board, or [R. 177] precisely what it is called I can't recall precisely; but there is such an organization, yes.

Q. What is the makeup of that committee?

A. Well, I know that each—well, you see the English Department is probably the largest single cohesive functioning academic unit at our institution. It remains substantially unchanged in our structure since I first came in 1967 and I know that this group elects annually a representative to this board, or this Executive Committee, or whatever it might be called. Presumably there is some system then for representing other members of the Union faculty throughout the entire school. Just exactly what the precise outlines of that are I don't know.

Q. Are you represented by the representative from the English Department?

A. The English Department has a representative on that committee.

Q. But, I mean, are you represented personally?

A. I don't feel that I am so represented. I guess that that's a matter of how one views representation. I don't happen to feel that I am fairly represented by an individual who I am not empowered to select or whose selection I am not empowered to participate.

Q. Have you ever attempted to participate on this Executive [R. 178] Committee that we referred to?

A. I have not sought direct participation in that group, no. I used to go to some of their meetings.

Q. Well, have you ever had an opportunity to speak to the group or to argue on a debate on a particular issue before the group? Have you ever attempted to do that?

A. I have never attempted to debate before the group. I sometimes went to listen. It's hard to break old habits and going to meetings.

Q. Were you welcomed there?

A. No, as a matter of fact after the attendance at one such meeting there was a later resolution passed which was—did not mention me by name, but which resolution—presumably this is in the record of the Association itself, which organization then passed the resolution saying that nonmembers were not welcome to attend such meetings.

Q. Nonmembers of what?

A. Of the Union and, as a consequence, I just never attended any more. I didn't push the issue to see if they would in point of fact thrust me from the door. I just didn't go back.

Q. Now, is that Union that you are referring to, is that the MCCFA?

A. That's right.

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[R. 186] Q. Now, let's move on to another topic briefly and that is the question of whether you felt free to talk to your administration regarding your employment.

A. No, I did not.

Q. Why do you feel that way?

A. Well, I feel that way because Article I, recognition, in the Master Contract says "The employer will not, during the life of this contract, meet and negotiate or meet and confer relative to the terms and conditions of employment with any employee or group of employees who are covered by this contract except through the exclusive bargaining representative." I might not read it properly but it seems to me to be clear. I am forbidden by that contract to do that so I cannot and I do not.

Q. Now, I would like to direct your attention to the meetings that are—well, first of all, are meetings held from time to time at the English Department level?

A. People who teach English are called together to meet with the Dean of Instruction. Whether or not there is, under the contract, a cohesive department, I guess I have always questioned. But, yes, we do with the Dean of Instruction.

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[R. 193] Q. Have you ever had a college administrator tell you that he could not listen to you regarding any matter of concern to you?

A. I would very much like to explain for the Master what my attitude is toward that.

Q. I think your Counsel can clarify that on Redirect Examination. I have a precise question—

A. What was it?

Q. Have you ever been told by a college administrator that he could not listen to your views or concerns on subjects of interest to you?

A. I have never brought such concerns to an administrator.

Q. So you have never been told by a college administrator that he could not listen to you?

A. They have never had the opportunity to so react.

Q. My question still stands. You have never, then, been told by a college administrator that they would not listen to you, is that "yes" or "no"?

A. I have never been so told.

Mr. Swenson: He has answered the question.

Mr. Goodwin: All right.

Q. And you certainly can talk to your fellow teachers about your viewpoints and your opinions on matters of concern to you.

[R. 194] A. That's an extremely difficult question to answer. I talked to them a number—to a number of them about such concerns. It's rather difficult to talk to some of them about my concerns since they will not speak to me at all.

Q. But there is no preclusion of you talking to your fellow members regarding matters of importance to you, isn't that correct?

A. What do you mean by my "fellow members"?

Q. Your fellow teachers, excuse me.

A. In the hallway, in the latrine, in the formal EOV meeting, it would vary, it would depend upon the circumstance.

Q. You, of course, can write letters to the administration regarding your viewpoint, can you not?

A. Oh, yes.

Q. And no administrator has ever told you that you cannot send a letter to him regarding—

A. No, no, they haven't told me that.

Q. And you can write letters to other officials, other State Officials other than administrators regarding your viewpoints of matters of concern to you?

A. It depends now. I have written a letter, if that's what you're talking about. I would be happy to tell you about that letter, if you want me to.

Q. You have written letters in the past?

A. I have written a letter.

[R. 195] Q. And you can write letters to other State Officials other than college administrators, can you not, on matters of concern to you?

A. I am capable of writing a letter, yes.

Q. And you certainly are free to talk to your State Representative on any matter that you choose to address, isn't that correct?

A. I can speak to my State Representatives about my opinions relating to any matter. However, in most of those matters, that Representative is not compelled by law to turn a deaf ear to me.

Q. No citizen has a special benefit where a State Legislator is going to be compelled to respond affirmatively to their request, are they?

A. No, but he is not compelled to respond negatively, either.

Q. In any event you are free to initiate those kinds of conversations, either orally or you can do it in written fashion?

A. I can write a letter to the Ayatullah asking him to free the hostages.

Q. None of these activities, writing letters or speaking, whether it be to the Legislators, college administrators or other State Officials, has ever in any way jeopardized your job?

A. No.

Q. And you have never been told by any State Official that [R. 196] your viewpoints however expressed were going to cause you your job?

A. No, but once again, I don't feel that your question permits me to express the type of view that I want to express.

Q. I think your Counsel can clarify that on Redirect, if he so chooses.

A. What was your question again? I'm sorry, I tend to forget them.

Q. I believe you have answered. And there has been no union representative that said to you that you will lose your job because you express certain views?

A. No union representative has ever used those words to me, no.

Q. And of course, you are free to band together in whatever group you would like to to pronounce ideas or opinions that are opposed to the exclusive representative system, are you not?

A. Once again, there is—I have freedom to do that, but the realities of the circumstances sometimes dictate otherwise. You effectively have no choice.

Q. So you are—

A. There is a difference between the practical and the theoretical. I think you know that.

Q. Your complaint is that you are free to do any number of things, but that you are not convinced that someone will [R. 197] act exactly as you request?

A. I don't expect anybody to act exactly as I request. I never have. I happen to be a believer in the democratic system, and I would like to participate in it.

Q. And you have the freedom to participate in it in the fashion we have just described, isn't that correct?

A. I would not characterize the fashion which you have described as being a democratic system. That's my objection in the first place. You are putting words in my mouth.

Q. You do not have to give any support to the Minnesota Community College Faculty Association other than a fair-share fee, isn't that correct?

A. I have had pressures brought to bear upon me to give allegiance other than the allegiance of money.

Q. And you have not given your allegiance?

A. And I have not given it.

Q. Okay. So the response, then, is, as I understand your testimony, that you have not given any allegiance or support to the MCCFA other than your fair-share fees which have been escrowed, isn't that correct?

A. No, and I don't feel that I have offered them allegiance and support by that. They have simply taken it. I suppose they could draft me.

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[R. 200] Mr. Lindquist: Mr. Mueting.

CROSS-EXAMINATION

By Mr. Mueting:

Q. Mr. Kjer, you had mentioned that you didn't support the strike that occurred in the community college system, is that correct?

A. That's correct.

Q. And that you exhibited your non-support for the strike by entering the classroom and trying to carry on your normal duties during the period of the strike?

A. I did not try to carry them on, I succeeded.

Q. I see. In that respect, were you impeded in any way by any college administrator?

A. No, I was not.

Q. Do you disagree with the concept of strikes by public school instructors generally?

A. It would be extremely difficult for me to answer that question, but if I have to say so, I guess philosophically, yes, yes, I do.

Q. Has President Helling been the President at the college ever since you have been at North Hennepin?

A. Yes.

Q. Have you ever spoken with President Helling privately?

A. Oh, sure. I did this morning.

Q. Since 1973 have you ever felt or have you ever been advised [R. 201] by President Helling not to speak with him?

A. I have been assiduous in my attempt to avoid placing him in a position where he would have to make that type of judgment.

Q. Is that based on anything that has been told to you by any college administrator?

A. No. It's based on what's told to me by the Master Contract.

Q. You indicated that you have communicated to someone in the community college system by letter, is that correct?

A. Yes.

Q. When was that?

A. I sent President Helling a letter last winter.

Q. And you mentioned that you meet fairly regularly with the Dean of Instruction?

A. I did not say I met fairly regularly with the Dean of Instruction, no. We meet once a quarter, I believe it is. I could be in error there, but once a quarter. Three times a year I would not characterize as being regular.

Q. Does the Dean prepare an agenda, you say, for those meetings?

A. Yes.

Q. And she tries to stick to her agenda?

A. Yes, she is very competent, very nice. She even has us out on time.

Q. Maybe I was assuming this: It is her agenda, then?

A. Yeah, she prepares it.

[R. 202] Q. Have you ever attempted to bring up anything outside the scope of that agenda?

A. No, I haven't.

Q. Have you ever met with any other administrators in the course of your duties or outside the course of your duties at—

A. We are required—every instructor is required every year—there is a concern at North Hennepin for improvement of instruction—to meet with an administrator relative to improvement of the instruction, and I have so met, yes.

Q. Have you ever been invited generally, not personally, but generally to attend any meetings, conferences or sessions with the president of the college to discuss any matters that you felt were relevant to you or that you were interested in?

A. Well, are you asking for a "yes" or a "no", or do you want the instance?

Q. I would like a "yes" or "no".

A. Yes.

Q. Who was the administrator?

A. President Helling.

Q. And is this on just one occasion?

A. Well, when school assembles in the fall, I understand with the exception of this year which is going to be different, we are all together and general information is passed out [R. 203] and new faculty are introduced, the status report on how

the sprinkler system is working and how the tennis courts are going, and we are sort of briefed on what's been going on during the summer. Yes, that's happened.

Q. Have you ever been invited to such a session when you were able to present to the President or anyone else present what your views were on any particular subject?

A. Oh, I'm sure I could have stood up and said something, but once again, I am not going to place my president under the stress of having to violate the principles espoused and the statements made in the Master Contract. I am not going to do that.

Q. Are these opening-year sessions the only opportunities that have been presented to you to meet—

A. No, no.

Q. Let me finish the question—to meet with John Helling or any other administrator on an informal basis?

A. Well, he sent a letter of invitation for all faculty to attend a rather nice breakfast after the strike last year. The difficulty was that I never got the invitation, and neither did anybody else who was not on the strike, but he tells me he sent it, and I believe him.

Q. Have you ever attended a community college board meeting?

A. No.

Q. Were you aware that community college board meetings —or [R. 204] a meeting has been held on the campus at North Hennepin Community College?

A. I am aware of that since yesterday.

Q. So that was the first time you have heard about it?

A. Yes. I don't read everything as carefully as I might. I am not suggesting that it wasn't advertised.

Mr. Mueting: I have no further questions.

REDIRECT EXAMINATION

By Mr. Swenson:

Q. Now, Mr. Kjer, are there any subjects—Mr. Goodwin has asked you the question whether you are free to talk with your administrator about concerns, your concerns, he has asked that kind of a general question. Now, I ask you are there any subjects that you are aware of that you may not talk to your administrator about for the purpose of influencing his decision on an issue?

A. I am not free to speak to my administration relative to curriculum matters. I am not free to speak to my administration relative to personnel matters. I am, in point of fact, not free to speak with my administrators on anything which is covered by the Master Contract. The Master Contract is very clear on that, unless I am misreading it just grossly, any condition of my employment, anything relative to terms and conditions of my employment, I am not free to speak to my administration.

[R. 205] Q. How do you get the Master Contract?

A. It comes in the handbook. I have always—

Q. Where does the handbook come from?

A. The handbook is distributed at the beginning of every school year prior to the start of this meeting which Mr. Mueting just described.

Q. By the administration?

A. Yeah.

Q. Do you understand that the administration intends to enforce the terms of that Contract?

A. I do not wish to place the administration in the awkward position of having to make that judgment. I believe that I am—no matter how noxious I might find the Master Contract—bound by it because of the law. So I don't run around

talking to the administration about things which are forbidden by the Master Contract. I don't want to put them in that position.

Q. But if you were to put them in that position, do you understand that the administration would be called upon to endorse that Contract?

A. If they want to follow the Contract the way I follow it, yes.

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TRIAL TESTIMONY OF
RALPH G. POWELL
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[R. 258] Q. Did Mr. Oatey ever tell you he would never talk to you if you didn't belong to the Facilities Committee? My precise question is did he ever tell you that he wouldn't talk to you about the facility?

A. I have been told by various Administrators—

Q. My question is did Mr. Oatey tell you that?

A. He has never said that he would not talk to me. He was not involved in the construction business anyway.

Q. Okay. Mr. Oatey's predecessor, did he ever tell you that he would not talk to you regarding the construction of the facility, whoever that predecessor was?

A. I was told that some things should be taken through channels.

Q. What that his predecessor, Mr. Oatey's predecessor?

[R. 259] A. No, of the Administrators that I mentioned I cannot give you dates or situations, but it seems to me that

it's been routine that in many of my discussions where the statement would be made that that would most appropriately be taken to faculty committees rather than dealing with it correctly.

Q. So you don't know if Mr. Oatey's predecessor made that comment or not?

A. I don't remember that he did or did not, either one.

Q. And you don't like an adversarial relationship because you believe it's against the kind of personal approach that you like to adopt at college?

A. I think it's counterproductive.

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[R. 260] Q. But, as I understand your testimony today, the primary complaint you have is that the posture of the dealing between teachers and administrators is not an adversarial one rather than a cooperative one?

A. No.

[R. 261] A. No. My personal feeling is that I do not have the freedom of choice of organizations or freedom of latitude of dealing with what I perceive as my professional responsibility because of the limitations of the exclusive agent that we now have.

Q. (by Mr. Goodwin continuing) There is no question in your mind, is there, that you can talk to any of your teachers regarding any subject or any opinion you have on any subject of concern to you?

A. Talking about them and effecting results are two different things.

Q. But there is no question you can talk to them about your views?

A. Absolutely.

Q. And there is no question that you can write letters regarding your views?

A. That's true.

Q. There is no question you can talk to State Representatives such as Legislators regarding your views, isn't that correct?

A. The response of many Representatives is that they will deal with an organization.

Q. There is no question that you can talk to a State Representative just as I can talk to a State Representative?

A. That's a freedom of the citizen.

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[R. 269] Mr. Lindquist: We went over that, Mr. Swenson.

Q. (by Mr. Swenson continuing) Now, on the Cross-Examination by Mr. Goodwin you were asked a question regarding a Mr. Oatey, and I believe the question was, essentially, whether Mr. Oatey or his predecessor had ever told you that you could not say certain things or speak to certain people. Do you recall that question and the testimony?

A. Yes, and the thing I tried to say was that, no, there has never been a time when I could not talk, but there have been occasions in whatever the topic happened to come up that I was told that that would best be handled through the procedures, Exchange of Views, and so forth.

Q. Who would tell you this?

A. Which ever administrator I would happen to be talking to and so forth.

Q. I see. Now, again, during Mr. Goodwin's Cross-Examination, Mr. Goodwin asked you whether you could talk to administrators and other teachers, whether you could write letters, whether you could talk to State Legislators and that sort of thing, and you said "Yes". My question to you on this

point is whether you believe that this talking and writing and so on is effective and productive communications with [R. 270] the people you want to talk to.

A. I said there was certainly a difference between merely talking and being able to achieve one's goal or establish one's position, and that in our given structure with the Faculty Association and Contract, that there is little opportunity for any effective establishment of a position other than the Faculty Association position.

Mr. Swenson: No further questions.

Mr. Mueting: I would like to ask two questions.

RECROSS-EXAMINATION

By Mr. Mueting:

Q. On your Redirect you talked about channeling communications through the Exchange of Views process. Were you a member of the MCCFA at the time this was told to you?

A. Uh-huh.

Q. Yes.?

A. Yes, I'm sorry.

Q. Were you a member of the Facilities Committee at that time?

A. Yes.

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TRIAL TESTIMONY OF
TERRENCE D. FLORIN
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[R. 277] Q. Had you ever attempted to become a member of Exchange of Views Committees at Normandale?

A. Yes.

Q. Could you just relate what those efforts were and what the results were?

A. Yes. In the fall of 1973, after classes commenced, during the first few days it's customary to organize in some fashion or another, and it wasn't at all clear what the organizational government structure was going to be at that time. Prior to that time we had had a system of governings known as the Faculty Assembly. The Faculty Assembly was divided into academic disciplines and divisions of disciplines along fairly traditional lines; humanities, social sciences and mathematics, etc. It was customary for those groups to meet and elect representatives to the various standing committees of the Faculty Assembly, academic standards, Personnel [R. 278] policies and so forth. At that meeting, for the science division, for which psychology was a part at that time, I put my name in nomination to represent the Social Science Division on the Academic Standards Committee of which I had been a member for the succeeding four years. I was informed by Mr. Michael Cummings, who is also a member of the Social Science Division at that time, and a member of the Association, that it was inappropriate for me to represent the Social Science Division because I was not a member of the Faculty Association. I left my name in nomination but I didn't receive any votes.

Q. So were you prohibited then from becoming a member of the Academic Standards Committee?

A. Yes.

Q. Would you describe the structure of the faculty at Normandale as it was prior to the spring of 1973 for the purpose of comparing that with what the structure is presently?

Mr. Goodwin: Your Honor, I object at this time. If it will expedite this we will stipulate it was a Faculty Senate through

four witnesses applicable as at Normandale as it was to North Hennepin.

Mr. Swenson: If that's true we will stipulate it.

[R. 279] By Mr. Swenson:

Q. Is that correct, that you had the same situation as at North Hennepin?

A. My understanding is it was somewhat different. The Faculty Senate, as it has been traditionally conceived involved representatives from various academic divisions of one sort or another representing their divisions, sitting in a representative body. The Faculty Assembly at Normandale ultimately involved decisions and votes being made by a more or less pure democratic form. They had committees that handled various kinds of functions, academic standards, personnel policies and so forth. But when those committees would make recommendations to the faculty as such as a whole and would be voted upon, in that way, in other words, decisions or votes were not taken by representatives but rather were cast by individuals in an assembly group.

Q. Now, there was a teachers' organization at that time, was there not?

A. Yes.

Q. That is prior to the spring of '73?

A. Yes.

Q. Was there any restrictions on who would become a member of the Faculty Assembly based upon membership in any organization?

[R. 280] A. Certainly not.

Q. So that he would become a member of the Faculty Assembly by virtue of being a teacher at the college, is that correct?

A. If you so desire.

Q. Now, what's the present situation?

A. The present situation is very simply in order to represent any group one must be a member, that is to say, sit on one of the committees which interact with the Administration. One must be a member of the Faculty Association.

Q. Well, can you be a member of one of the Exchange of Views Committees if you are a nonmember?

A. No.

Q. But otherwise apparently the Exchange of Views concept is the same as Normandale as we have heard it talked about at North Hennepin?

A. That is my understanding, yes.

Q. Could you characterize the nature of the relationship between the faculty and the Administration prior to the spring of 1973 for the purposes of comparing it with the present situation?

A. The relationship between the faculty and the Administration prior to the institution of the Master Contract was very seldom, if ever, a question or an issue.

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[R. 283] Q. Do you feel that you are required to support the MCCFA in any other way or if not support at least acquiesce?

A. I have no function in the academic governance of the institution because I am not a member of the Faculty Association.

Q. Well, when you say you have no function, do you mean you have no opportunity to participate in the exchange of ideas and expression of views?

A. That's correct.

Mr. Swenson: Okay. No further questions.

CROSS-EXAMINATION

By Mr. Goodwin:

Q. You have heard Mr. Powell testify today, haven't you?

A. Yes.

Q. You would agree with him that, of course, you can speak and write on any number of subjects near and dear to your heart?

A. I'm not sure I understand the question.

Q. Let me make it a little clearer. You can speak and write on any subject you want to?

A. To write or speak on?

Q. To write and speak on?

[R. 284] A. Yes.

Q. And you object to the change because you believe it is a deliberate attempt to react in an adversarial way rather than more of a collegial way?

A. That's correct.

Q. Which is to say another way you object to it is because teachers are now acting like a Union rather than the traditional Senate?

A. I'm objecting to it because I find that the methods which had been employed in the construction and conduct of this organization are, in my opinion, inappropriate in the circumstances involved.

Q. While that model, in your opinion, may be appropriate for common laborers it certainly isn't appropriate for the educational elite?

A. I'm not sure whether it's appropriate for what you call "common laborers" or not. I am not a member of the educational elite so I can't speak for them either. I am a member of the educational community and as such I think it's inappropriate for the educational community.

Q. Even if all of the activities, every single activity that the collective bargaining representative engaged in deals directly with negotiating a wage package for you, you would still object to have that system applied to you, is that correct?

[R. 285] A. That's correct.

Mr. Goodwin: I have no further questions.

CROSS-EXAMINATION

By Mr. Mueting:

Q. Mr. Florin, the committee assignment which you sought, I believe it was the Academic Standards Committee?

A. That's correct.

Q. Was that a faculty committee?

A. Prior to that time the committee was composed of—whether it was the Academic Standards Committee, Personal Policies Committee, or what have you, were composed of both faculty and Administration. So it would be inappropriate to characterize it as "faculty committees". In other words, the President, the Dean of Students, the Dean of Instruction, the Assistant Deans of Instruction, etc., served on those committees.

Q. So there was just one committee?

A. That's correct.

Q. Comprised of both administration and faculty?

A. Yes.

Q. You sought to be a faculty representative?

A. That's right.

Q. And I take it from your testimony that you did not receive a vote, there was an election?

A. Yes.

[R. 286] Q. You weren't elected?

A. I left my name in nomination but it was strictly one of the Faculty Association members.

Q. Did the Administration at Normandale have anything to do with the selection of faculty membership on the committees?

A. Not to my knowledge.

Mr. Mueting: No further questions.

REDIRECT EXAMINATION

By Mr. Swenson:

Q. Mr. Florin, on Mr. Goodwin's cross-examination you were asked whether you could speak on any subject that was basically what the question was. You said "Yes." Now, would that include speaking personally and directly to your Administrator about your terms and conditions of employment?

A. As I understand Mr. Goodwin's question it was a very general question, it wasn't qualified in any way. I, of course, can—that is to say, I am able, at least at the present time, to speak whenever and wherever I choose. Whether or not I will be heard is quite a different matter.

Q. Well, do you think you will be heard at Normandale?

A. No.

Q. Do you know any particular reason for that?

[R. 287] A. Because I am not a member of the Faculty Association.

Q. Now, so far as you know, does the MCCFA only engage in negotiating a wage package?

A. Certainly not.

Q. What else do they do?

A. As nearly as I can tell their influence permeates almost every aspect of my job, certainly the environment in general is affected by the Faculty Association. The governing structure, which is traditionally been an internal college or university, and I don't care whether you're talking about Normandale Community College or whether you are talking

about Harvard University, they have traditionally been internal. My interpretation of the events of the summer of 1973 indicated to me that the internal governing structure of Normandale was no longer in our control, it was out of our control and it was in the hands of the State Union officials.

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[R. 289] Q. Do you recall on the examination of Mr. Swenson that he asked you the question "Do you feel free or can you talk to your college Administrators at Normandale," do you recall that?

A. Yes, I do.

Q. As I recall your answer you said you didn't think you could or did I misunderstand you?

A. What I was attempting to say was that, you know, if I encountered one in the hall and I started talking to them I could certainly do that and as long as I was talking about the weather, those kinds of mundane things, I would probably get a response. That is to say I would probably be heard. If I started objecting to some aspect of the governance of the institution, or the environment, etc., other than the external environment, it would go, at least as far as I can tell, unheeded.

Q. Well, you responded by saying "Yes I did that". Have you ever done that? Have you ever talked to an administrator since the Master Contract came into effect regarding terms and conditions of employment?

A. On two occasions I have attempted to.

Q. And they listened to you?

[R. 290] A. No.

Q. Who were they?

A. Dr. Arland Otty who was at that time and is the Dean of Instruction.

Q. And the other individual?

A. Same person both times.

Q. Okay. I take it they turned around and walked away?

A. It happened to be in Dr. Otty's office and he suggested to me that it was inappropriate for him to communicate with me on that particular subject because I was not a member of the Association nor had I been approved. I think that was the term he used. I had not been approved or appointed by the State Faculty Association to talk about those kinds of subjects.

Q. What was the subject?

A. I think it had to do with the class scheduling.

Q. Do you know if that particular subject is covered in the Master Contract?

A. My understanding is that terms and conditions of employment under which class scheduling and that sort of thing would fall is an issue which is relegated to decisions but that are relegated to the Administration to be advised or conferred, I'm not sure of the language, with the Faculty Association in a Meet and Confer capacity or something to that effect.

TRIAL TESTIMONY OF
JAMES K. DURHAM
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[R. 466] Q. Sir, you testified that you were in a leadership position in MCCFA prior to the application of the Public Employment Labor Relations Act to the community college, is that correct?

A. I held office.

Q. Now, prior to the application of PELRA was it your understanding that decisionmaking authority over terms and

conditions of employment in the community colleges was solely vested in the Community College Board?

A. Okay, which authority again?

Q. Decisionmaking authority for terms and conditions of employment, that is, they had to go to Legislature of course to be founded, but in terms of decisions in the colleges themselves, the Community College Board and [R. 467] its administrators were the sole decision maker?

A. Yes, with the exception, however, much of the Legislature and Executive Branch of the State government impinged upon that.

Q. At that time then they had unilateral authority to make decisions in terms of conditions of employment?

A. Again with that same qualification.

Q. Leaving out the superiors in the government?

A. Yes.

Q. There was no need for them at that time, was there, to meet and negotiate or meet and confer with any faculty organization or with MCCFA prior to exercising this decisionmaking authority?

A. Well, yes, I think there was a need for them to. I think there is always a need for management.

Q. I'm not talking perhaps factual need for information, required to do so.

A. You said requirement, I don't believe there was a legal requirement.

Q. Now, under Public Employment Labor Relations Act the situation is somewhat different from that, is it not?

A. That's true.

Q. Now, there is a legal requirement before terms and conditions of employment are established in the community

colleges, the Board or its agents must meet and negotiate [R. 468] with an exclusive representative, is that correct?

A. That's correct.

Q. And before the Board or its agents take certain actions that are subject to the so-called meet and confer proceedings of PELRA they must meet and confer with the Community College Faculty Association, is that correct?

A. That's correct.

Q. Sir, have you ever heard of the phrase "countervailing power" used in the context of labor relations?

A. Sounds like something I might have heard but it's not a real part of my knowledge, if you're after something specific.

Q. Well, let's come at it this way, what is MCCFA's policy or attitude because perhaps it has not been put into written policy toward the Community College Board refusing to negotiate terms, and conditions or employment with MCCFA?

A. I don't understand your question.

Q. Well, does MCCFA take the view that the Community College Board has the authority to refuse to negotiate terms and conditions of employment with MCCFA or any part of terms and conditions of employment with MCCFA?

A. First of all I believe that the statute designates the Commissioner of, it was Personnel, now Employee Relations with that responsibility and the Board has been included, [R. 469] but that the statute does not refer to the Board.

Q. All right. Well, amending the question then, talk about the negotiator, whoever that happens to be, spokesman for the Board, authority that speaks to that question on behalf of the Board, does MCCFA accept the proposition that that agent, whoever he may be, has any authority to refuse to negotiate any aspect of terms and conditions of employment with MCCFA?

Mr. Miller: I'm going to object to the extent that calls for legal interpretation by this witness on what the employer's legal powers will be under PELRA. Answer it if you can, Mr. Durham.

The Witness: That was what I was searching for in my mind, what that legal definition is. I know there are some categories of Management's rights that are excluded from bargaining. I couldn't list all those for you now but other than that, legally the parts that are not excluded then I would say, yes, the State must negotiate with the exclusive representative on the other items.

By Dr. Vieira:

Q. Is the policy of MCCFA with respect to terms and conditions of employment included in the Master Collective Bargaining Agreement that the State cannot change, alter, modify those conditions without first consulting with [R. 470] MCCFA?

A. It is our position that a signed contract cannot be altered even after consultation. It can only be altered by mutual agreement of both parties.

[R. 471] Q. (by Dr. Vieira continuing) So to that extent, then, is it not true, sir, that under PELRA MCCFA has become joint maker of policy with Board in terms of terms and conditions of employment?

Mr. Miller: Again, objection to the extent it calls for a legal interpretation of PELRA by this witness.

Dr. Vieira: I am speaking practically, sir. I mean practically speaking.

Mr. Lindquist: Practically speaking, answer it, if you can.

A. Well, practically speaking, both sides have to agree to the contract, so to the extent that the contract covers terms

and conditions, they have to be mutually agreed upon. Therefore, we are equal partners in that process.

Q. And the statute does require, does it not, sir, that the State must negotiate with MCCFA?

A. The statute requires that the State must negotiate with the exclusive representative.

Q. That's what I mean—

A. In this case it's—

Q. Which happens to be MCCFA?

A. Yes.

Q. Is it not correct that MCCFA's role in the meet and negotiate process under PELRA is that of an advocate for [R. 472] its members' position or its members' goals?

A. Its position is to be an advocate for all of the people we represent, and that includes people who are not members.

Q. For the bargaining unit, then?

A. The bargaining unit.

Q. Well, to what extent do nonmembers of MCCFA and the bargaining unit have an opportunity to influence the development of MCCFA bargaining policy?

A. We have two to three—it varies from year to year, and in some cases I think perhaps more than that—surveys that are sent to all members of the bargaining unit, and those are used by the Negotiations Committee in determining contract proposals and establishing priorities.

Q. After those priorities and proposals have been determined and MCCFA representatives enter into negotiations with the agents of the Board, the negotiators of the Board, would it not be correct to characterize those negotiations in the vernacular as—quote/unquote—arms lengths negotiations?

A. I don't know what that means.

Q. That means that you come in taking the position of trying to get the best result from the negotiating process that you can on behalf of the people that you represent and not being concerned—necessarily concerned, at least, with the position of the other side.

[R. 473] A. Our primary concern is to represent our people, yes.

Q. Sir, I think you were here when Chancellor Helland testified as to his belief that one of the purposes of the meet and negotiate/meet and confer provisions of PELRA was to give—or is to give the exclusive representative some influence over the course of terms and conditions of employment in the community colleges. Do you recall hearing that testimony?

A. I don't remember in those specific words, but I think that kind of attitude.

Q. Do you concur in that view that as a matter of at least practice during the years you have been president you have tried to use meet and negotiate and meet and confer processes of PELRA to exert some influence on the development of terms and conditions of employment in the community colleges favorable to the interests of the faculty members you represent?

A. Certainly.

Q. In fact, that's been your goal as an exclusive representative, has it not?

A. That's correct.

Q. In fact, you try to exert as much influence as you can within the structure that's given to you, is that correct?

A. We try to exert effective—

Q. That's right, you try to be as effective as possible, is [R. 474] that correct?

A. Yes.

Q. Without exclusive representation, that is without the structure that requires the agents of Board to negotiate and confer with MCCFA uniquely, could MCCFA possibly be as effective in representing the interests of its members or all faculty members in the community colleges as it has been?

Mr. Miller: Objection, calls for the speculation of the witness.

Mr. Lindquist: Well, the objection is overruled.

Dr. Vieira: I am asking for a practical judgment on the part of a man who has been involved in this negotiations process, and then earlier had seen it—had seen the system without exclusive representation.

Mr. Lindquist: I think the witness is qualified to speak on this.

Q. Do you feel that exclusive representation makes you more effective or less effective?

A. Oh, certainly more.

Q. In your experience do you believe that the results in terms of the terms and conditions of employment that community college faculty members have attained over the years have been better or worse under exclusive representation as opposed to the nonexclusive representation process?

[R. 475] A. I think the benefits gained under exclusive representation have been greater than they would have been without exclusive representation.

Q. So you believe, then, that MCCFA as the exclusive representative has been effective to some degree in achieving its goals?

A. Yes.

Q. Viewed from the perspective of the goals of MCCFA, do you believe that its beneficial to you to require having all

the faculty members in the bargaining unit accept MCCFA as their representative?

Mr. Miller: Objection. No foundation. Have we established what the goals of the MCCFA are?

Dr. Vieira: Whatever they are.

Mr. Miller: Whatever they are?

Dr. Vieira: Whatever they are.

Mr. Miller: Answer it, if you can.

A. What was the question again?

Q. Do you believe that it is beneficial to MCCFA in terms of attaining any of its goals to have all of the faculty members of the community colleges required to accept MCCFA as their exclusive representative?

A. I am puzzled by what you mean by "required to accept".

Q. Well, as a matter—

A. You mean by the statute?

[R. 476] Q. By the statute, by PELRA, required to have MCCFA—they may not accept it in some ideological sense—but required to have it as their exclusive representative.

A. I think it's beneficial to the faculty to have exclusive representation.

Q. Well, the question I ask, though, is do you think it's beneficial to MCCFA in terms of achieving its goals.

A. Yes, which are the faculty goals.

Q. Oh, but in terms of achieving its goals, then you go on to say that they are the faculty goals?

A. (Witness nods head.)

Q. Is it possible, sir, that there are some members of the faculty, whether they are members or nonmembers of MC CFA, who do not concur in the view that the goals of MCCFA are the goals of the faculty as a whole?

A. On any issue at any moment we have people who don't agree, whether they are members or not members. This is a group of highly educated, intelligent, and extremely independent people, and to think that there is unanimity on every issue would be—it's dreaming. Certainly, there are people who disagree. I often disagree with a decision that's made if I get outvoted.

Q. All right. Sir, do you know of any group, organization, association, whatever, other than MCCFA that can require community college administration to negotiate or confer [R. 477] with it with respect to terms and conditions of employment and college policies?

A. There are other organizations that negotiate with the Community College Board or Department of Personnel.

Q. Which other?

A. Well, there is the Teamsters—

Q. No, sir—

A. —AFL/CIO—

Q. They don't negotiate with respect to community colleges' terms and conditions of employment for faculty, do they?

A. Not for faculty.

Q. That's what I'm talking about, with respect to terms and conditions of employment for faculty, MCCFA is the only group you know of that can require the administration to negotiate or confer?

A. That's correct.

Q. With respect to the negotiations and conferences that actually go on and have been going on while you have been president for the past five years, do you know of any group other than MCCFA that can demand to participate in those conferences?

A. Which conferences are you talking about?

Q. Negotiations and the meet and confer processes, that is MCCFA is one, the Board people are another, is there anybody else that can demand and require you or the Board [R. 478] to allow them to participate in the negotiations or the conferences under PELRA?

A. Not other than Department of Personnel or the executive branch of government.

Q. That is the superior legal authorities to the Board?

A. Right.

Q. Now, sir, with respect to the negotiations that have been held over the years, with which you are familiar at least, have these negotiations been held in private or public?

A. Well, they have always been open. There are sometimes observers and sometimes not. The only times that the negotiations have been closed when we are in mediation and the Mediator—State Mediator decided that they should be closed.

Q. What about the openness of the exchange of views and meet and confer sessions? What has been the practice there over the years?

A. The practice is that they are open to anyone who wants to observe. The practice has, also, been that it's not been a real high drawing power.

Q. Sir, do you know if the State of Minnesota has a public meetings or so-called sunshine law?

A. Yes, we do.

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[R. 650] Q. As President of the MCCFA have you ever informed any non-MCCFA member that they should not attempt to express their views and their opinions concerning their employment relationship with community college Administrators?

A. No.

Q. Are you aware of whether any other MCCFA officers have made such an attempt?

A. No. I'm not aware of that and it would be folly to do it because, first of all, we couldn't enforce it. And secondly, you'd probably get a strong reaction and get [R. 651] more trouble than it would be worth.

Q. Are you aware of either the MCCFA Board of Directors, the Executive Committee, or the Delegate Assembly has ever made any statement indicating that non-MCCFA members should not be expressing their views and opinions concerning their employment relationship to College Administrators?

A. Not as individuals. I think there have been motions suggesting or requiring, you know, which that nonmembers should not be involved in the formal exchange of views. They cannot represent the faculty. But, nothing that deals with them as individuals.

Q. By the formal exchange of views or Meet and Confer process, do you mean by that any such meeting as which the MCCFA is conducting pursuant to the Collective Bargaining Agreement?

A. Yes, that's what I meant.

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[R. 671] Q. Sir, isn't it correct to say that it's MCCFA's policy or practice—let's call it practice—that the community college Administration should recognize only MCCFA as the official spokesman for the community college faculty?

A. We're designated as the exclusive representative.

Q. Not only that, but it's your practice to tell the Administration that only your position can be accepted as the position of the faculty, isn't that right?

A. Well, I don't remember having occasion to tell an Administrator that directly. I think that the Administration understands that we are the exclusive representative.

Q. Understands it in what way? Don't you—I mean, is your view of the position of MCCFA is the position of the faculty period.

[R. 672] A. The official position, yes.

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[R. 673] Q. You were asked whether or not the MCCFA was the exclusive representative for representing the faculty. Mr. Durham, have you ever, or has any other MCCFA officer, told any community college Administrator that they were not to listen to a non-MCCFA member who wished to express an opinion concerning his or her employment relationship?

A. Not to my knowledge, no.

Mr. Miller: I have no further questions.

Ms. Sims: I have no questions.

REDIRECT EXAMINATION

By Dr. Vieira:

[R. 674] Q. I just have one other question for you, Mr. Durham. With respect to whether you've ever told administration people that they shouldn't listen to nonmembers of MCCFA, isn't it true that MCCFA's position is that the Administration is precluded from dealing verbally, in writing or any other way with an individual, a nonmember of MCCFA with respect to the terms and conditions of employment in the community college system?

A. I believe that Management is prohibited from a formal negotiation or a formal Meet and Confer or Exchange of Views to terms and conditions. I do not believe that Management is prohibited from listening to concerns of an individual faculty member.

Q. Well, Mr. Durham, I just have a problem understanding what the distinction you are making is. Can a nonmember of MCCFA, as you view the situation, go to an appropriate com-

munity college Administrator and say "I would like to talk to you personally about changing some of the terms and conditions of the employment that apply to me. I would like to sit down with you right now in the coffee shop or in your office and I would like to discuss that matter and come to an arrangement with you." Isn't it true that the MCCFA takes the position that the Administrator cannot do that?

A. Well, it hinges on I guess what you're talking about when [R. 675] you're saying "arrangement." It certainly is not our position that an individual faculty member cannot sit down and talk to an Administrator. This happens all the time. A nonmember. But, they can't negotiate a new condition for terms of employment. That's outside of the contract, or in violation of the contract.

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TRIAL TESTIMONY OF
RALPH F. CHESEBROUGH
pp. 769-770
774-778
781-782
784-785

[R. 769] Q. Mr. Chesebrough, MCCFA takes the position, does it not, that the community college administration may not refuse to negotiate terms of the conditions of the employment with MCCFA?

A. State that again.

Q. MCCFA takes the position, does it not, that the community college administration may not refuse to negotiate terms and conditions of employment with MCCFA?

A. I think that as the exclusive representative of the faculty, the employer is required to negotiate terms and conditions of employment with MCCFA.

Q. Well, it's MCCFA's position, is it not, that that requirement should be enforced and a binding law?

A. In this context, what do you mean by "MCCFA"? Do you mean the delegate assembly, the Board? Do you mean have they taken a specific action?

Q. Well, let's start with you as the chief negotiator for MCCFA. Is that the practical position you take when dealing with spokesmen for the community college administration, that they are required to negotiate with MCCFA on terms and conditions of employment?

A. I understand that as a part of the law.

Q. At least one result of the law in the practical sense, Mr. Chesebrough, has been that MCCFA now has more influence or more opportunity I should say to influence terms and [R. 770] conditions of employment in community colleges than it had before the Meet and Negotiate process came into being?

A. I certainly hope so.

Q. In fact, sir, MCCFA views the meet and negotiate process under PELRA as one means which it can attempt to exert influence on the direction of community college policy. Is that not so?

A. I don't think that the MCCFA has ever taken the position that the meet and negotiate was a way of influencing college policy.

Q. Well, a way of influencing the determination of terms and conditions of employment in the colleges?

A. I think that as a practice the association has negotiated terms and conditions of employment under the Statute.

Q. As a practice or as a practical matter, do you see that negotiation as a means of influencing the outcome in terms of what terms and conditions of employment are ultimately determined to be?

Mr. Miller: Objection. I believe the question has been asked and answered at least twice now.

Mr. Lindquist: I thought it had been answered. Objection sustained.

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[R. 774] Q. Sir, you have been involved in the meet and negotiate process I believe you said since 1972, is that right?

A. I believe 1972 was the year. I'm not absolutely certain.

Q. During the course of your involvement with meet and negotiate at community colleges, have you ever become aware of any group other than MCCFA that can require community college administrator to negotiate with it with respect to any matters of community college policy?

A. I don't think that there is any group that can negotiate relative to any matter of community college policy.

Q. Sir, are terms and conditions of employment a matter of community college policy? You're using policy in an interesting way here. What are terms and conditions of employment in the community colleges?

A. I guess my understanding of the Statute is somewhat different than yours. It's my understanding that there are aspects of policy that we simply cannot negotiate.

Q. With respect to the subjects that you can negotiate, are you familiar with what those are?

A. I think so.

Q. You had eight years to study them, haven't you?

A. Yes.

[R. 775] Q. Do you know of any group other than MCCFA that can require community college officials to negotiate on those subject matters?

A. I believe that the American Association of the State, County and Municipal Employees rep[illegible]sents some groups of

community college employees, and I believe the Teamsters represent some groups of community college employees.

Q. I'm talking about the terms and conditions of employment for community college faculty members.

A. I don't believe you said faculty members in your question.

Q. Well, I'll restate it that way. Faculty members, in terms and conditions of employment in which MCCFA has been involved in negotiating in the last eight or so years, is there any other group that you know of that can require the community college administration to negotiate on those matters?

A. The Minnesota Community College Faculty Association is the exclusive representative of faculty members in the bargaining unit. By definition of exclusive representative, I believe that we are the only ones who can meet and negotiate on their behalf. There are some other faculty members who are not on the bargaining unit.

Q. As a practical matter, you know of no other group, do you, sir, in the last eight years or since MCCFA has become an exclusive representative that has ever negotiated with the [R. 776] college administration over terms and conditions of employment for faculty members?

A. You characterize it as a practical matter. I don't know about whether it's a practical or impractical. I know of no other group.

Q. Do you know of any group that can demand to participate in the negotiations that go on between MCCFA on the one hand and the community college administrators on the other?

A. Well, if I understand the Statute, any group that can show a sufficient showing of interest from faculty members can petition the Bureau for jurisdictional election and become involved in that process.

Q. Do you know of any group that has done that?

A. Not to my knowledge.

Q. When a jurisdictional election is held, what is the result of that election?

A. An exclusive representative may be elected or the bargaining process may be rejected by the members of the bargaining unit. They may choose no representative.

Q. So what you're telling me in essence is—

Mr. Lindquist: What's the reason to educate the Court about labor relations? I just don't understand the purpose of your inquiry. I don't think that these are issues in this case. Do you?

[R. 777] Dr. Vieira: Well, I thought exclusive representation was one of the issues in the case.

Mr. Lindquist: The Court knows all about exclusive representation. You don't have to educate us on that. I'll call your attention to the fact that we were going to be one hour with this witness this morning. We have gone about two hours now. We have got two witnesses standing by I guess. Do you want to have evening sessions or early morning sessions, okay; but we are going to move on with this case.

Dr. Vieira: I'm sorry, Your Honor. This witness is being evasive.

Mr. Lindquist: I agree too. I think the witness could be more forthright too.

By Dr. Vieira:

Q. I have just a few more questions, Mr. Chesebrough. You believe, do you not, that the process of meet and negotiate in which MCCFA engages changes the outcome of the determination of terms and conditions of employment, that is they are different as a result of the process of meet and negotiate than they would have been without that process?

A. That's the assumption under which we operate, yes.

Q. In fact, it's true, is it not, that the assumption under which you operate is that you try to maximize the degree [R. 778] of change favorable to the positions that you want to achieve?

A. We try to negotiate a contract that is the most desirable contract for the people we represent that we can negotiate.

Dr. Vieira: I have no more questions of this witness.

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[R. 781] Q. Mr. Chesebrough, apart from the times that you have estimated in conjunction with IMPACE related activities, would you give us a general description of what you do spend your time on?

A. Well, I would spend a great deal of the time in the grievance process, and conferring with members relative to the problems and concerns, or interpretation of the contract, or relative to concerns they have about their employment relationship that they may feel is unfair, or unjust. We confer about whether or not there is a grievance. I spend a great deal of time with grievance representatives. I spend a great deal of time in the negotiation process and research in preparation for that and at the table. I worked in a much much less a degree with the various committees of the association, arranging those. I arrange for the meeting places and the physical arrangements and packets for the Board members for the Board meeting and for the Delegate Assembly meetings and for the Executive Committee meetings. I meet on all occasions with the Meet and Confer Committee as well as with the Negotiation Committee.

Q. As a part of your activities and duties have you ever informed a non MCCFA member that they cannot [R. 782] express any views or opinions they may hold concerning their employment relationship with college administrators?

A. No, I have not told a non member that they could not express their own views.

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[R. 784] Q. Are you aware that there was a faculty senate at Normandale Community College prior to the implementation of the collective bargaining agreement?

Mr. Miller: I am going to object to this line of questioning as being beyond the scope of cross. Mr. Vieira had the opportunity to visit about those subjects as part of his initial examination.

Mr. Lindquist: I understand you have just a few more questions.

Dr. Vieira: Yes. Mr. Miller asked Mr. Chesebrough whether he could be—.

Mr. Lindquist: Proceed. Objection overruled.

By Dr. Vieira:

Q. Are you aware that there was a faculty senate prior to the implementation of the collective bargaining agreement at Normandale Community College?

A. Specifically at Normandale I don't know if there was a faculty senate or not.

Q. Do you know if there was a faculty senate at any of the community colleges?

A. There was faculty senates or faculty council. If the term was used it was not uniform on some of the campuses.

[R. 785] Q. As a practical matter were those not in fact replaced by the meet and confer or exchange of views committees under the MCCFA under the collective bargaining agreement?

A. Under the collective bargaining agreement the meet and confer process was established as a means of exchanging views on the campuses for faculty input.

Q. But didn't that replace the faculty senate?

A. Sir, I don't know that the word "replace" is the accurate word. As far as I know there were no longer those other organizational structures.

Q. You understand that there was some cause and effect between the two things happening; that is, meet and confer process being implemented in the disappearance of the faculty senates?

A. I think there is a relationship there, yes.

Q. In fact the relationship is one of direct cause and effect, is it not, sir?

A. Sir, again the contract provided that there would be a meet and confer process in accordance with the contract established on those campuses. That left, it seems to me no reasonable position for there to be another organized structure there.

Dr. Vieira: No further questions.

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TRIAL TESTIMONY OF
DONALD WAYNE HOLMAN
pp. 839-840

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[R. 839] Q. Can you recall what the structure was at Willmar pre-1973 as the faculty governance? How did the faculty go about making decisions among itself dealing with the policies and the questions that it wanted to raise to the administration?

A. Well, I don't know what dates you're picking. I can pick —when did I come? 1965?

Q. Okay.

A. We had a series of curriculum committees, this committee, that committee, personnel committee. We made recommendations to the administration, and the administration did what they felt like.

Q. Who could join those particular committees?

A. On our campus, I guess everyone is eligible, everyone who is a member of the association.

Q. So there was no lack of eligibility for membership on those committees because a person was or was not a member of any particular group? I mean you had to be a member of the faculty but other than that—

A. Not that I know of.

Q. Now does that system of—by the way, did you participate in any of those committees?

A. Yes.

[R. 840] Q. Functionally speaking, how did those committees deal with the administration? What was the mechanism they used to bring their concerns to the attention of the administration?

A. Sort of a show and tell operation. They would meet and write a report.

Q. Who would meet?

A. The members of the committee.

Q. They read the report and would take the record—

A. To the faculty.

Q. To the faculty as a body?

A. As a body.

Q. What would they do?

A. Vote it up or down.

Q. After it would be voted up or down, what would be done?

A. It would be implemented or an interpretation would be made on how it would be implemented by the chief administrator.

Q. Now do those committees still exist to your knowledge?

A. Yes, in a different form I guess. They still have curriculum. We still have personnel.

Q. What is the difference in the form?

A. At that time the administrator was serving on the committee and now we don't.

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TRIAL TESTIMONY OF
RONALD A. LIEVENSE
pp. 1024-1030

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[R. 1024] Q. One of your concerns in the fact of working inordinately hard is with you because you don't like the fact you came from 24 release hours down to 20 release hours and that causes you to work harder?

A. In physical education you're basically talking four courses which amounts better than eight hours per week.

Q. In what, better than eight hours in what?

A. It becomes eight hours of contact with the students over a period of a year, which gets to be a lot more time.

Q. Have you ever talked to President Lorenz about any of your concerns?

A. Oh, yes.

[R. 1025] Q. And what have you told him?

A. Pardon?

Q. And what have you told him?

A. The very thing I'm telling you.

Q. Is it fair to state that the complaints you reiterated in this courtroom here today are complaints you have made known to Mr. Lorenz on more than one occasion?

A. Offhand, I don't know if it was once or twice, some place in there.

Q. But you have made them aware to Mr. Lorenz outside of this courtroom?

A. Yes.

Q. And he's never told you you couldn't talk to him?

A. No, he's never done that.

Mr. Goodwin: I have no further questions.

CROSS-EXAMINATION

By Mr. Mueting:

Q. Mr. Lievense, you indicated you attended an Exchange of Views meeting at one time, is that correct?

A. Yes.

Q. What was the name of that committee that was holding that meeting?

A. I think it was the Curriculum Committee.

Q. And when was that?

A. I would say it would have to be four years ago.

[R. 1026] Q. So what would that make it, 1976?

A. Could be, it was just prior to all the plans being finalized for the addition to our activity building.

Q. And was that a formal Exchange of Views meeting?

A. It was a formal one, yes, to my understanding.

Q. Was there representatives from both the administration and the faculty there?

A. Yes.

Q. And what was told to you by an administrator regarding your right to speak?

A. That I couldn't respond.

Q. Was there a question presented to you for a response by someone?

A. One of my colleagues.

Q. And who was the administrator who told you you couldn't respond?

A. He probably forgot about this one, President Lorenz.

Q. He told you you couldn't respond to the question. What was the question that was put to you?

A. To do with additional space.

Q. Is that all you remember about it?

A. Yes, something about, you know, how much space was needed. There was some discussion on how much, how many square feet we should have in addition to the building, and so forth, and type of courses that were going to be offered. [R. 1027] So one of my colleagues asked me how much space is needed for this and I responded.

Q. Who was the person asking you the question?

A. I can't tell you, all I know is somebody in that committee because it was a pretty full room.

Q. And you were trying to respond to a faculty member's question?

A. Yes.

Q. Wasn't a question from any of the administrators, was it?

A. No, it was not.

Q. You also indicated once that you wished to talk to an administrator about, I believe it dealt with credits for one of your colleagues. You thought there was some unfairness involved in that. What was the situation there?

A. The activity release was for, for women's athletic directors versus activity release for men's.

Q. Who do you think was being unfairly treated?

A. I felt I was.

Q. So you were going to the administrator on your own behalf?

A. Yes.

Q. And you wanted that taken care of by the administrator?

A. I was hoping somebody would at least listen to me.

[R. 1028] Q. Would you classify this in general terms as a grievance?

A. Well, my main concern was it had to do with budgets and the last page of the budget, some question was directed, what are some things that you feel would help a better function of the institution, so I made some statements on that in the preparation of the budget.

Q. You're talking about your case in particular, aren't you?

A. Right.

Q. And you were dissatisfied with that, weren't you?

A. That's right.

Q. Who did you go to talk about it with an administrator?

A. Dean of Students.

Q. Who was that?

A. Dr. John Hillborn (phonetic).

Q. What year was that, do you recall?

A. It's been the last two, it was in the spring of '77.

Q. Did you—

A. Possibly '79, excuse me.

Q. And did you express—

A. No, spring of possibly '80, I'm sorry.

Q. Oh, so it was this year?

A. Yes.

Q. And did you express to him your concern?

A. Yes.

Q. When you were the chairman of your department you had quite [R. 1029] a bit of authority, didn't you?

A. Oh.

Q. You had more authority than you do now?

A. Very much so because I'm coordinator now.

Q. And you were able to evaluate your fellow faculty members at that time, weren't you?

A. I was one of many.

Q. You had that authority, didn't you?

A. Well, I don't know, we all got together and just formed a committee.

Q. Did you have the authority as a member of that committee or not?

A. Sure I had the authority.

Q. And you don't have that now?

A. No.

Q. And you resent that?

A. Yes, because I feel it's very important we evaluate each other.

Q. Have you ever told the administration you would like to give to any member of the administration your views on a colleague?

A. Explain yourself, I guess I don't get the question.

Q. With regard to the job that a fellow faculty member is doing and your evaluation of that person, have you ever

gone to the administration to talk about your feeling on [R. 1030] faculty members and the job they are doing?

A. I think that's, you know, if you are athletic director you discuss things like this.

Q. And have you ever been told that they won't discuss it with you?

A. I don't believe I have ever been told, it's just that there is no response.

Q. But you have been able to express yourself, haven't you?

A. I guess I have been given the opportunity.

Q. Have you ever attended any other Exchange of Views meetings other than the one you have just told us about earlier?

A. Come to think about it I think I did, but I just sat in.

Q. Have you ever requested to be recognized as a special witness?

A. Have I ever requested?

Q. Yes.

A. No.

Q. You are aware of that, aren't you, that there is a provision for special witness?

A. I heard it in previous testimony.

Q. That was the first you ever heard of it?

A. Yes.

Q. Do you ever read the policy manual at the college?

A. Yes.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-74 Civ. 659

LEON W. KNIGHT, et al.,

Plaintiffs,

vs.

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, et al.,

Defendants.

ORDER

Before HEANEY, Circuit Judge, ALSOP, District Judge, and LARSON, Senior District Judge.

This matter comes before this Court on the plaintiffs' motion for relief. They assert that the defendants have violated this Court's order of March 31, 1982, in three important respects. First, the defendants prevented the plaintiffs from participating in the decision regarding which meet and confer committees to establish. Second, the defendants created election procedures that effectively enabled only members of the Minnesota Community College Faculty Association (MCCFA) to be selected for those committees. Third, defendant MCCFA discriminated against the plaintiffs by announcing that it would reimburse expenses incurred by faculty representatives on meet and confer committees only if they were MCCFA members and supported its positions at meet and confer meetings.

We find no merit to the plaintiffs' first and third contentions. With respect to the first contention, the plaintiffs were permitted to recommend a committee structure to the chancellor of the community college system. The same right was extended to the MCCFA. Thereafter, the chancellor made a unilateral decision regarding the meet and confer committee structure. This procedure comports fully with our 1982 decision. With respect to the plaintiffs' third contention, the MCCFA has a right to pay the expenses of its members who are elected to meet and confer committees and to decline to pay those expenses for nonmembers.

There is merit, however, to the plaintiffs' second contention; that is, that they have been denied the opportunity to select and serve as meet and confer representatives by the election procedure which has been adopted. Under the meet and confer system established after our 1982 decision, each meet and confer committee had six faculty members. Committee members were selected through the following election procedure: The MCCFA convened a general meeting of the faculty. Any faculty member present could nominate a faculty member, including himself or herself, to serve on a meet and confer committee. The MCCFA endorsed six candidates for each committee. All faculty persons were required to vote for six persons for each committee. If they failed to do so, their votes were voided. As a result of this election procedure, no non-MCCFA member was elected to be a meet and confer representative for this school year. As long as MCCFA members continue to constitute a majority of the faculty persons voting and they vote for the union endorsed slate, no non-MCCFA member can ever be elected.

In our view, this election procedure contravenes our 1982 decision. In the memorandum opinion accompanying our order

for judgment, we emphasized the vital importance of the First Amendment rights to freedom of expression and association in the higher education context and declared unconstitutional the practice of having the MCCFA select all meet and confer representatives because it "deprive[d] [nonunion faculty members] a fair opportunity to participate in the meet and confer process." To date, the challenged election procedure has operated to totally exclude non-MCCFA faculty from membership on meet and confer committees; it will likely operate to do so in the foreseeable future. Thus, it denies nonunion faculty members the opportunity to participate meaningfully in the meet and confer process in contravention of our original judgment and order.[1]

Nonetheless, we do not believe that it is necessary to void the elections for the current school year. By the time that new elections could be conducted, the school year would be over. In order to ensure that our 1982 decision is effectuated, however, we do require that new elections be held at the beginning of the 1983-84 school year. In these elections, the procedures used in the contested election may be used with one exception—a provision permitting cumulative voting must replace the present requirement that each voter must cast a vote for

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[1] To support the challenged selection procedure, the MCCFA relies upon several cases declaring constitutional a requirement that voters in elections for public officials must vote for as many candidates as there are positions to be filled. *E.g.*, *Amedee v. Fowler*, 275 F. Supp. 659 (E.D. La. 1967); *Boineau v. Thorton*, 235 F. Supp. 175 (E.D. S.C. 1964), *aff'd*, 379 U.S. 15 (1964). These cases are plainly distinguishable from the instant one. Unlike this case, they did not arise in the context of higher education in which First Amendment freedoms are especially important and are entitled to protection absent compelling, legitimate state interests which cannot be furthered by less intrusive means. In this case, there are means through which the defendants can accomplish the legitimate goals underlying the meet and confer process, while not intruding on the First Amendment rights of non-MCCFA faculty members by effectively denying them a fair opportunity to select and serve as meet and confer representatives. *See* slip op., *infra* at 3-4.

one of the candidates for each committee position. Under such a cumulative voting system, each elector will have a number of votes equal to the number of committee members to be chosen and will be permitted to concentrate his or her votes on one candidate, or to distribute them as he or she sees fit. This system will not guarantee that non-MCCFA faculty members will be selected for committee membership. It, however, will ensure that nonunion faculty members will be able to elect at least one representative to each meet and confer committee if the committee size is retained at six, non-MCCFA faculty members constitute at least 17 percent of those present at the election, and they concentrate their votes behind a single candidate.

The parties shall develop the details of an election procedure which is consistent with this opinion and submit their proposal to the Court no later than June 1, 1983. The plaintiffs' motion that the MCCFA and State Board for Minnesota Community Colleges be held in contempt of this Court's 1982 decision is denied.

Judgment shall be entered in accordance with this order.

Dated this 5th day of April, 1983.

GERALD W. HEANEY
United States Circuit Judge

DONALD D. ALSOP
United States
District Judge

EARL R. LARSON
U.S. Senior District Judge

Nos. 82-898 & 82-977

Office Supreme Court, U.S.
FILED
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L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES, *et al.*,

Appellants,

v.

LEON W. KNIGHT, *et al.*,

Appellees;

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*,

Appellants,

v.

LEON W. KNIGHT, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Minnesota

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APPELLEES' MEMORANDUM IN RESPONSE TO JURISDICTIONAL STATEMENTS

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Nos. 82-898 & 82-977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES, *et al.*,

Appellants,

v.

LEON W. KNIGHT, *et al.*,

Appellees;

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, *et al.*,

Appellants,

v.

LEON W. KNIGHT, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Minnesota

APPELLEES' MEMORANDUM IN RESPONSE TO JURISDICTIONAL STATEMENTS

INTRODUCTION

Pursuant to this Court's request, Appellees Leon W. Knight, *et alia*, hereby support the Court's assumption of jurisdiction in these cases.

STATEMENT IN SUPPORT OF JURISDICTION

Together with case No. 82-901,[1] cases Nos. 82-898 and 82-977 arise out of the same basic challenge to the exclusive-representation scheme of Minnesota's Public Employment Labor Relations Act (PELRA). The District Court held that this scheme is constitutional in so far as it applies to *negotiations* between the Minnesota Community College Faculty Association (MCCFA) and the Minnesota State Board for Community Colleges (Board), and unconstitutional in so far as it applies to *conferences* between these parties.[2] Leon Knight appealed the first ruling in No. 82-901; and the Board and MCCFA appealed the second in Nos. 82-898 and 82-977.

Just as they invoked this Court's jurisdiction in their own appeal, Appellees emphatically assert that jurisdiction here. Appellees reject any contention that this "appeal is not within this Court's jurisdiction, or * * * not taken in conformity with statute or with [this Court's] Rules".[3] They deny that "the questions on which the decision of the cause depends are so unsubstantial as not to need further argument".[4] And they admit their inability to offer "any other ground

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[1] Knight v. Minnesota Community College Faculty Ass'n, No. 82-901 (U.S. Sup. Ct., Jurisdictional Statement filed 1 December 1982).

[2] Appendix to Jurisdictional Statement of Appellant Minnesota State Board for Community Colleges in No. 82-898, at A-8 to A-17, and A-17 to A-29.

[3] Rule 16.1(a) of the Rules of the Supreme Court of the United States. *See* 28 U.S.C. § 1253 (1976).

[4] Rule 16.1(c) of the Rules of the Supreme Court of the United States.

* * * as a reason why the Court should not set the case[s] for argument".[5]

Indeed, because the three companion cases Nos. 82-901, 82-898, and 82-977 involve interrelated constitutional attacks on exclusive representation in public-sector employment, Appellees submit that no reasonable ground exists for the Court to refuse to exercise jurisdiction over any of them. For the stark judicial fact is that *this Court has never sustained exclusive representation, in principle or as applied, in public employment, in private employment, or in any other area of human endeavor.* To the contrary: In every instance where the issue arose, this Court has declared the device, or its applications, unconstitutional.

The leading decision in private employment is *Carter* v. *Carter Coal Co.*[6] As the Court said there, referring to the exclusive-representation labor-provisions of the Bituminous Coal Conservation Act,[7]

> [t]he effect, in respect of wages and hours, is to subject the dissentient minority * * * to the will of the * * * majority * * *.
>
> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.[8]

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[5] Rule 16.1(d) of the Rules of the Supreme Court of the United States.

[6] 298 U.S. 238 (1936).

[7] Act of 30 August 1935, ch. 824, 49 Stat. 991.

[8] 298 U.S. at 311.

And, as Chief Justice Hughes added,

> [t]he [majority-rule] provision permits a group of * * * employees, according to their own views of expediency, to make rules as to hours and wages for other * * * employees who are not parties to the agreements. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirements of due process of law.[9]

Self-evidently, the holding in *Carter* is directly relevant to every form of governmentally imposed exclusive representation,[10] and remains as valid and vital today as when enunciated nearly half a century ago.[11] Certainly the application of *Carter* to the PELRA's exclusive-representation scheme is a not "unsubstantial" question that "need[s] further argument".[12]

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[9] *Id.* at 318 (concurring opinion).

[10] *Carter* would not reach purely voluntary arrangements adopting exclusive representation that private employers and unions negotiated under common law or pursuant to merely permissive statutory authority.

[11] The *Carter* Court premissed its holding on earlier decisions in *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), *Washington* ex rel. *Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), and *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912). 298 U.S. at 311-12. Since then, these cases have received approbation in many opinions. *E.g.*, Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 677-78 (opinion of the Court), 683 & n.5 (Stevens, J., dissenting) (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 6-7 (1974); National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1973); New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96, 125-26 & n.30 (1978) (Stevens, J., dissenting); McGautha v. California, 402 U.S. 183, 252-54 & nn.2-3, 271-73 & nn.21-22 (1971) (Brennan, J., dissenting).

[12] Appellees intend to defend the District Court's decision in Nos. 82-898 and 82-977 in part on the same grounds that they oppose that Court's ruling in No. 82-901.

After *Carter*, the unconstitutionality of exclusive representation in private employment escaped judicial review on three occasions. When the validity of the National Labor Relations Act [13] was first in issue, the Labor Board selected its test-cases "intentionally [to] avoi[d] presenting the Court with [this] 'touchy' and * * * doubtful questio[n]".[14] And in *NLRB* v. *Jones & Laughlin Steel Corp.*,[15] this Court avoided the problem of *exclusive* representation by interpreting the statute to permit individual employees to bargain directly with their employer over the terms and conditions of their employment.[16] Similarly, in a contemporaneous challenge to the Railway Labor Act [17] in *Virginian Railway* v. *System Federation No. 40*,[18] the Court held that exclusive representation under that statute allowed individual contracts between an employer and its employees.[19] These holdings reflected

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[13] Act of 5 July 1935, ch. 372, 49 Stat. 449, *now* 29 U.S.C. § 151 *et seq.* (1976).

[14] J. A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law, 1933-1937* (1974), at 187.

[15] 301 U.S. 1 (1937).

[16] *Id.* at 45 (act does not prevent "employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' ").

[17] Act of 20 May 1926, ch. 347, 44 Stat. 577, *now* 45 U.S.C. § 151 *et seq.* (1976).

[18] 300 U.S. 515 (1937).

[19] *Id.* at 548-49.

the unanimous position of the litigants on the issue.[20] The later decision in *Steele* v. *Louisville & Nashville Railroad Co.*[21] also pretermitted the question, by creating the "duty of fair representation"—precisely to avoid grappling with serious problems of due process and equal protection that unlimited exclusive representation raised.[22]

In its first decision implicating exclusive representation in public employment, *City of Madison, Joint School District No. 8* v. *WERC*,[23] this Court felt it unnecessary to define "the extent to which true contract negotiations between a public body and its employees may be regulated".[24] But it squarely held

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[20] *See* Arguments in Cases Arising Under the Railway Labor Act and the National Labor Relations Act Before the Supreme Court of the United States, February 8-11, 1937, S. Doc. No. 52, 75th Cong., 1st Sess. (1937), at 13, 33-34, 40, 88-89, 118.

Only seven years later, in cases raising issues of statutory construction alone, did this Court purport to re-interpret the National Labor Relations and Railway Labor Acts to preclude individual contracts under some circumstances. J. I. Case Co. v. NLRB, 321 U.S. 332, 334-39 (1944); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346-47 (1944). Neither of these decisions, however, reconsidered the constitutional matters discussed in *Jones & Laughlin Steel Corp.* and *Virginian Railway*, although the statutory constructions adopted in those cases predicated their constitutional holdings. *See* Comment, "The Mechanics of Collective Bargaining", 53 *Harv. L. Rev.* 745, 789-91 (1940).

[21] 323 U.S. 192 (1944).

[22] *Id.* at 198. *See* Vaca v. Sipes, 386 U.S. 171, 182 (1967). *See generally, e.g.*, Weyland, "Majority Rule in Collective Bargaining", 45 *Colum. L. Rev.* 556, 568-69 (1945).

[23] 429 U.S. 167 (1976).

[24] *Id.* at 175.

under the First and Fourteenth Amendments that "the principle of exclusivity cannot constitutionally be used to muzzle a public employee who * * * might wish to express his view about governmental decisions concerning labor relations".[25] More recently, this Court heard oral argument in *Perry Education Association* v. *Perry Local Educators' Association*,[26] a case raising the question of the extent to which an exclusive representative of public-school teachers may constitutionally negotiate special privileges for itself in a collective-bargaining agreement in order to stifle dissent from its policies among employees in its bargaining-unit.

Obviously, these *post-Carter* decisions demonstrate beyond cavil: (i) that this Court has never addressed the constitutionality of exclusive representation itself under a private- or public-sector labor-relations act;[27] and (ii) that this Court has found not "insubstantial" and "need[ful of] further argument" mere secondary effects of exclusivity far less constitutionally significant than the primary issues the parties raise in Nos. 82-901, 82-898, and 82-977.

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[25] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 230 (1977) (opinion of Stewart, J.).

[26] No. 81-896 (U.S. Sup. Ct., oral argument held 13 October 1982).

[27] Although, strictly speaking, *Carter* turned on the unconstitutionality of the labor-provisions of the Bituminous Coal Conservation Act, to label it solely a "labor-law" decision would nonetheless be misleading, as it dealt more fundamentally with the invalidity of corporative-state arrangements in general. *See* Vieira, "Compulsory Public Sector Collective Bargaining: The Trojan Horse of Corporativism", *Gov't Union Rev.*, Vol. 2, No. 1 (Winter 1981), at 56. *See also* P. Bradley, *Constitutional Limits to Union Power* (1976).

CONCLUSION

Appellees therefore urge this Court to take jurisdiction of Nos. 82-898 and 82-977, and set these cases (together with No. 82-901) down for full briefing and oral argument.

Respectfully submitted,

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Nos. 82-977 & 82-898

IN THE

Supreme Court of the United States

October Term, 1983

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION,

Appellants,

v.

LEON W. KNIGHT, et al.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF ON THE MERITS OF APPELLANT LABOR ORGANIZATIONS

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QUESTIONS PRESENTED

1. Does a state public employee bargaining law violate the First and Fourteenth Amendments to the United States Constitution where it requires a public community college board to formally meet and confer only with an exclusive bargaining representative of its instructors, and permits that exclusive representative to retain control over the selection of persons to participate on behalf of it in meet and confer activities?

2. If public community college instructors are constitutionally entitled to run and vote in elections for membership on meet and confer committees established by a public employee bargaining law, do the First and Fourteenth Amendments to the United States Constitution require that a system of cumulative voting be used in conducting such elections?

3. Did the district court abuse its discretion in awarding plaintiff-appellees twenty percent of their costs in this case?

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IN THE

Supreme Court of the United States

October Term, 1983

No. 82-977 and 82-898

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION,

Appellants,

v.

LEON W. KNIGHT, et al.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF ON THE MERITS OF APPELLANT LABOR ORGANIZATIONS

CITATION TO OPINION BELOW

The opinion of the three-judge United States District Court has not been officially reported. It has been unofficially reported at 111 LRRM 3156.

JURISDICTION

This action was commenced by plaintiffs pursuant to 42 U.S.C. §§ 1983, 1985(3), 1986, and 1994 alleging violations of their rights under the First, Ninth, Tenth, Thirteenth and Fourteenth Amendments to the United States Constitution. The action sought an injunction restraining the enforcement and operation of a state statute, and thus a three-judge district court panel was established pursuant to 28 U.S.C. §§ 2281 and 2284.

The district court issued its order granting in part and denying in part the relief sought by plaintiffs on March 31, 1982. Motions for relief from judgment, for a new trial and to alter or amend the judgment by both plaintiffs and defendants were denied by the court on August 13, 1982. The appellant labor organizations filed a notice of appeal with the United States District Court for the District of Minnesota on October 12, 1982.

The Supreme Court is vested with jurisdiction over this appeal by 28 U.S.C. § 1253.

STATUTES INVOLVED

The district court declared unconstitutional, as applied, certain provisions of the Minnesota Public Employment Labor Relations Act (hereinafter "PELRA"), Minn. Stat. §§ 179.61-179.76 (1982). Pertinent portions of PELRA are set forth in the Appendix to Jurisdictional Statement of Appellant Minnesota State Board for Community Colleges at 87-95.

In addition, the appellant labor organizations' appeal of the district court's cost award to plaintiffs involves Rule 54(d), Fed. R. Civ. P., which provides:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs

shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

STATEMENT OF THE CASE

This case was initiated by the appellees to challenge certain provisions of the Minnesota Public Employment Labor Relations Act, Minn. Stat. §§ 179.61-179.76 (1982) (hereinafter referred to as "PELRA") as unconstitutional both on their face and as applied. PELRA establishes a comprehensive framework for collective bargaining between public employers and their employees in Minnesota. The appellees, who are public employees, challenged the constitutionality of exclusive representation in collective bargaining under PELRA, the ability of the appellant Minnesota Community College Faculty Association to constitutionally act as the exclusive representative, and the constitutionality of the "meet and confer" procedures established by PELRA. The appellees sought injunctive and declaratory relief against enforcement of the provisions of PELRA pertaining to these issues. The lower court denied the requested relief with one exception: it enjoined PELRA as applied in the area of the "meet and confer" procedures.

Appellee Leon W. Knight and the other plaintiff-appellees (hereinafter collectively referred to as "Knight" or "Knight and his colleagues") are employed as instructors in the Minnesota Community College System (hereinafter "the System"). At the time of trial, the System consisted of eighteen institu-

tions located throughout the State of Minnesota which provide a two-year program of post-secondary education to students. Minn. Stat. § 136.60 (1982). The System is operated by the appellant Minnesota State Board for Community Colleges (hereinafter "State Board"), a state agency composed of citizens appointed by the governor. Minn. Stat. § 136.61 (1982). The State Board selects a chancellor to act as chief executive and operational officer of the System. (R. 395-96).[1] Each community college has a president who reports to the chancellor. (R. 396). The appellant Minnesota Community College Faculty Association (hereinafter "MCCFA") is a labor organization which is certified pursuant to PELRA as the exclusive collective bargaining representative of all instructors employed by the State Board. It is affiliated with appellants Minnesota Education Association and National Education Association (the three organizations shall be referred to collectively as "the appellant labor organizations").

Prior to 1971, the relationship between the instructors and the administration on each campus was largely a local matter. As a result, the level of participation by instructors in the operation of the community colleges varied widely. On some campuses the instructors and the administration discussed campus issues through organizations such as a faculty senate. Other campuses were characterized by the centralization of decision-making in the administration. (A. 46).[2]

In 1971, the State of Minnesota enacted PELRA, which contained provisions with a substantial impact on the relationship between the instructors and the administration. The framework established by PELRA borrows in certain respects

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[1] All references to the trial transcript which have not been reproduced in the joint appendix shall be cited as (R. ——).

[2] All references to the joint appendix shall be cited as (A. ——).

from familiar principles of labor law established in the private sector. In particular, PELRA embraces the concept of exclusivity of the certified exclusive representative. The statute sets forth procedures, supervised by a state agency (the Bureau of Mediation Services), to ensure the fair selection and certification of an employee organization as exclusive representative by a majority of the employees in an appropriate bargaining unit. Minn. Stat. § 179.67 (1982). Once certified, the employee organization under PELRA, like that in the private sector, has the exclusive right and duty to represent all employees in the bargaining unit in the negotiation of "terms and conditions of employment." [3] PELRA specifically prohibits a public employer from meeting and negotiating with anyone other than the exclusive representative.[4] In addition, also similar to the private sector, PELRA restricts the duty to meet and negotiate[5] imposed on the public employers to those matters which are "terms and conditions of employment." The public employer is not required to meet and negotiate concerning matters of "inherent managerial policy," which include "such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel."[6] Pursuant to PELRA, the State Board and the MCCFA have negotiated

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[3] PELRA's definition of "terms and conditions of employment" is found at Minn. Stat. § 179.63, subd. 18 (1982) (Juris. A. 89). All references to the Appendix to Jurisdictional Statement of Appellant Minnesota State Board for Community Colleges shall be cited as (Juris. A. ——).

[4] Minn. Stat. § 179.66, subd. 7 (1982) (Juris. A. 91).

[5] PELRA's definition of "meet and negotiate" is found at Minn. Stat. § 179.63, subd. 16 (1982) (Juris. A. 89).

[6] Minn. Stat. § 179.66, subd. 1 (1982) (Juris. A. 90).

successive collective bargaining agreements covering terms and conditions of employment. (Pl. Ex. 1; R. 92).[7]

Unlike the private sector, PELRA also established new rights to participation by professional employees[8] with respect to those matters which are outside the scope of mandatory negotiations but which relate to employment. In this regard, PELRA, at Minn. Stat. § 179.73 (1982), provides:

> Subdivision 1. The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas regarding all matters not specified under section 179.63, subdivision 18 [which defines negotiable "terms and conditions of employment"].
>
> Subd. 2. The professional employees shall select a representative to meet and confer with a representative or committee of the public employer on matters not specified under section 179.63, subdivision 18, relating to the services being provided to the public. The public employer shall provide the facilities and set the time for such conference to take place, provided that the parties shall meet together at least once every four months.[9]

The statute defines "meet and confer" as "the exchange of views and concerns between employers and their respective

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[7] All references to plaintiffs' trial exhibits shall be cited as "Pl. Ex."

[8] PELRA's definition of "professional employees" is found at Minn. Stat. § 179.63, subd. 10 (1982) (Juris. A. 88).

[9] Other sections of PELRA which emphasize this right are found at Minn. Stat. § 179.65, subd. 3 (1982), Minn. Stat. § 179.66, subd. 3 (1982) (Juris. A. 90-91).

employees." Minn. Stat. § 179.63, subd. 15 (1982). As professional employees, instructors in the System acquired the right to "meet and confer" through a representative with the State Board concerning those matters classified as within the inherent managerial prerogative as a result of PELRA's enactment.

It is clear from the language of Minn. Stat. § 179.73, set forth above, that even professional employees who have determined not to collectively bargain terms and conditions of employment have the right to meet and confer through a selected representative. Where a collective bargaining representative has been chosen, however, that "meet and negotiate" representative is also the "meet and confer" representative. The principle of exclusivity applies equally to the meet and confer function, and thus the employer must only engage in formal meet and confer with the exclusive representative.[10] PELRA specifically preserves the right of individual employees to express views, grievances, complaints or opinions concerning employment related matters.[11]

The implementation of PELRA and the selection of the MCCFA as the exclusive representative caused a restructuring of the relationship between the instructors and the State Board. On those campuses where there had been little or no faculty participation in the governance of the college, PELRA resulted in a dramatic increase in faculty input both in matters covered by meet and negotiate and in matters covered by meet and confer. On those campuses where there had previously been faculty senates or other formal vehicles for

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[10] Minn. Stat. § 179.66, subd. 7 (1982) (Juris. A. 91).

[11] Minn. Stat. § 179.65, subd. 1 (1982) (Juris. A. 89). This point is emphasized by Minn. Stat. § 179.66, subd. 7 (1982) (Juris. A. 91).

faculty input, the governance structures were replaced by both the meet and negotiate, and meet and confer procedures. (A. 46-48).

The meet and confer structure which developed is two-tiered, and is set forth in the collective bargaining agreement between the State Board and the MCCFA.[12] On the first level, both the MCCFA and the State Board are represented by statewide meet and confer committees which discuss issues applicable to the entire system. On the second level, the MCCFA chapter at each campus and the administration at each campus are represented by local "exchange of views" ("EOV") committees which discuss issues specific to the particular campus falling within the area of meet and confer. Unlike the state level where there is a single meet and confer team for each side, there will typically be several local EOV committees at a single campus. The committees discuss such designated topics such as "Personnel", "Student Affairs," "Curriculum", "Facilities", "Fiscal Matters" and "General Matters." At some campuses however there are as few as one EOV committee.

As previously noted, the meet and confer committees discuss subjects which are not within the mandatorily negotiable "terms and conditions of employment". Such subjects have included selection and evaluation of community college administrators, planning of new facilities, academic accreditation, and student rights. (A. 41). Meet and confer committees have also discussed interpretation of the collective bargaining agreements resulting from the meet and negotiate process. *Id.*

In choosing individual instructors to represent it on meet and confer committees, the MCCFA has observed the practice

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[12] The provisions of the contract pertaining to meet and confer structure are found in Pl. Ex. 1; R. 92 (A. 35-36).

of selecting only persons who are members of the MCCFA. (A. 43). Under PELRA, public employees are not required to join the organization which acts as their exclusive representative.[13] Non-members may, however, be required to pay a fair share fee to the exclusive representative not to exceed 85 per cent of regular membership dues and not to exceed the amount of regular membership dues less the cost of benefits financed through dues and available only to members.[14]

The establishment of the meet and confer procedure has not prevented instructors, whether they belong to the MCCFA or not, from expressing their views on matters which come before the meet and confer committees. (Juris. A. 50, A. 92-93, 98-100, 130-131, 148-150, 184-189). The State Board and the local administration on each campus regard the MCCFA as the official faculty spokesman, and the position it advocates is considered the official faculty position. (A. 50). Testimony at trial makes clear, however, that the employer recognizes that individual instructors may have different opinions on any given issue. *Id.* A variety of avenues exist and have been utilized for the expression of those individual views. Foremost is the ability of instructors to communicate to individual administrators their views on issues deemed important. (A. 61-62, 72). The college administrators called by Knight at trial testified that such dialogue is a common occurrence. (A. 84-85, 100-102). Furthermore, there are a number of occasions where expression of individual views is invited, including State Board meetings which rotate among the various campuses, and meetings routinely held by college

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[13] Minn. Stat. 179.65, subd. 2 (1982).

[14] Minn. Stat. § 179.65, subd. 2 (1982).

presidents during the school year. (A. 57).[15] Thus, while the meet and confer process gives weight and focus to the faculty position as formulated by the faculty's exclusive representative, all instructors may freely express their views on subjects within the purview of meet and confer, whether those views coincide with the position forwarded by the MCCFA or not.

The primary issue raised before the Court by this appeal results from the MCCFA's practice of appointing only its members to meet and confer committees. The complaint and request for a three-judge district court was filed in the United States District Court for the District of Minnesota on December 19, 1974. After Knight's request for a three-judge panel was denied by the District Court, the United States Court of Appeals for the Eighth Circuit, on May 17, 1976, reversed and ordered such a panel established. *Knight v. Alsop*, 535 F. 2d 466 (8th Cir. 1976). Discovery followed, with Knight unsuccessfully seeking appellate relief from certain district court decisions concerning discovery issues. *Knight v. Heaney*, 444 U.S. 821 (1979) (denying motion for leave to file writ of mandamus); *In re: Knight*, 614 F. 2d 1162 (8th Cir. 1980) *petition for rehearing en banc denied*, 614 F. 2d 1162 (8th Cir. 1980) (denying petition for writ of mandamus) *cert. denied*, 449 U.S. 823 (1980). On December 13, 1979, the District Court appointed a Special Master to conduct the trial of this matter. The trial commenced on August 4, 1980, and recommended findings of fact were issued by the Special Master on March 23, 1981. (Juris. A. 54). The District Court issued its Findings of Fact on November 16, 1981 (Juris.

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[15] Such occasions include "town meetings" open to all instructors, departmental meetings with the college president, faculty breakfasts and lunches, and being available in the common area of the campus. (A. 61-62, 83-84, 98-100).

A. 32), and its Memorandum Opinion and Order on March 30, 1982. (Juris. A. 7).

In addition to the meet and confer issue, Knight raised substantial issues challenging the constitutionality of exclusive representation in collective bargaining under PELRA, and the ability of the MCCFA constitutionally to act as an exclusive representative. The District Court's order ruled against Knight on these issues. Further, the court upheld the facial constitutionality of the meet and confer provisions of PELRA. The court sustained Knight's contention, however, that it is unconstitutional under the First and Fourteenth Amendments to the United States Constitution for the meet and confer process to operate in a way which excludes instructors who are not members of the MCCFA from participating in the selection of or being eligible for membership on meet and confer committees. In addition, the district court ruled that twenty percent of appellees' costs would be assessed against the State Board and the MCCFA.

Appeals were filed with this Court by the State Board and the appellant labor organizations on November 30, 1982 and December 10, 1982, respectively. The Court noted probable jurisdiction on March 28, 1983, and ordered the two appeals consolidated and set for oral argument.

Prior to this Court noting probable jurisdiction, elections were conducted in the System in which all instructors (MCCFA members and non-members alike) were permitted to nominate candidates, run for election and vote. The elections were for positions on both the statewide and local meet and confer committees. Each voter was required to cast one vote for as many candidates as there were positions to be filled on the various committees. No non-MCCFA members ran for the statewide committee while several did pursue local

EOV positions. The elections resulted in MCCFA members holding all positions on all meet and confer committees.

Knight subsequently moved the district court for relief, claiming that the election procedures were not consistent with the Court's order of March 30, 1982. On April 15, 1983, the Court ruled that the election procedure had failed to provide Knight with a "fair opportunity to select and serve as meet and confer representatives." In order to provide such a fair opportunity, the court ordered that new elections be conducted using a system of cumulative voting. (A. 192-193).

On April 26, 1983, the appellant labor organizations moved this Court for leave to expand the appendix and add the issue of requiring cumulative voting raised by the lower court's April, 1983, order. The Court granted this motion on June 3, 1983.

SUMMARY OF ARGUMENT

The lower court's ruling that PELRA's meet and confer procedure violates the First Amendment improperly assumes the existence of First Amendment interests in two respects. First, it assumes that there is a right under the First Amendment not only to speak, but also to compel the government to listen and to respond. This assumption is contrary to *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979). Second, it assumes that the First Amendment limits the discretion of the government in choosing who to confer with concerning policy decisions. This assumption is contrary to *Elrod v. Burns*, 427 U.S. 346 (1976). While the First Amendment may have some impact on rights of access to public forums, and even non-public forums, the meet and confer process is not a forum; it is private consultation by the gov-

ernment. Therefore, there is no First Amendment interest implicated by the meet and confer system.

Even if meet and confer is considered to be a non-public forum, the exclusive right of the MCCFA, as exclusive representative, to meet and confer is reasonable, and is not intended to suppress a speaker's views because a public official disagrees with them. The meet and confer structure therefore meets the standard adopted in *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 74 L.Ed. 2d 794 (1983).

The fact that this case arises in a higher education system does not mean that First Amendment academic freedom principles are implicated. The lower court's assertion that the meet and confer process involves academic freedom issues is premised on an erroneous view of the tradition of faculty participation in the governance of the Minnesota community colleges. Other courts have refused to recognize any First Amendment right to faculty governance. Moreover, by undermining the exclusivity of the MCCFA the lower court's decision detracts from rather than enhances the influence of the faculty in the affairs of the community colleges.

Even if the First Amendment requires that faculty members be extended "a fair opportunity to participate" in the selection of the meet and confer representative, PELRA provides such an opportunity. PELRA provides extensive procedures for the democratic selection of the exclusive representative in which all faculty members, regardless of their organizational affiliations, may participate. Instructors are not compelled to join any association in order to participate in this process. Any pressure which instructors feel to conform their views to those of the majority is inherent in any system for democratic election of representatives.

Compelling governmental interests support PELRA's meet and confer structure, even if First Amendment interests are present and are held to be infringed. These interests include avoiding confusion in presentation of employee views, avoiding subjecting the employer to conflicting demands and minimizing rivalries within the bargaining unit. If separate and independent representatives acted in the meet and confer, and meet and negotiate areas, the resulting conflict and inconsistency would undermine the functioning of both and jeopardize the interest of affording fully effective representation to public employees.

The District Court's supplemental order requiring cumulative voting in the election of meet and confer representatives is wholly unprecedented and exceeds even the measures ordered in the sensitive area of alleged racial discrimination in the election of candidates to public office. The lower court's order improperly suggests a First Amendment right to proportional representation.

The District Court's requirement that the MCCFA and the State Board pay to Knight twenty percent of his costs is an abuse of discretion. The portion of costs awarded bears no rational relationship to the portion of the proceedings on which Knight succeeded. The cost award requires the MCCFA and the State Board to subsidize the unreasonable conduct of Knight and his counsel throughout this case.

ARGUMENT

I. THE DISTRICT COURT'S ORDER THAT PUBLIC EMPLOYEES HAVE A CONSTITUTIONAL RIGHT TO A FAIR OPPORTUNITY TO PARTICIPATE IN THE SELECTION OF A MEET AND CONFER REPRESENTATIVE IS ERRONEOUS.

A. The First Amendment Does Not Entitle Knight To Compel The State Board To Either Listen Or Respond To Him.

The District Court's decision is fundamentally flawed by two assumptions which it makes concerning the role of the First Amendment in private consultations by government policymakers. First, the District Court improperly assumes that Knight has a First Amendment right to exchange views with the State Board. Second, the District Court erroneously assumes that the First Amendment limits the discretion of government policymakers in deciding with whom to consult. Both of these assumptions are not only contrary to the First Amendment principles long established by the Court, but, if adopted, would create enormous practical problems as public officials attempt to satisfy the lower court's standard.

Knight has no First Amendment right to exchange views with the State Board. The First Amendment guarantees to Knight the right to express and publish his views on any subject he chooses, including, obviously, the subjects discussed in meet and confer meetings. The First Amendment does not extend to Knight the right, however, to compel any individual or entity, private or public, to listen to his views or to respond to his views.

It is clear that the District Court's reading of the First Amendment grants to Knight a right to compel the State

Board to both listen to him and to respond to him. This First Amendment right to compel a listener and a response is apparent from the District Court's reliance on the concept of "meaningful expression." The District Court recognizes in both its factual findings and its memorandum opinion that Knight is fully able to express his views at any time on a variety of subjects, including subjects discussed in meet and confer meetings. Further, college administrators have listened and discussed such subjects with Knight and his colleagues on an informal basis. This, the District Court rules, is insufficient because Knight's expression is not a part of the "official" system for faculty expression through the MCCFA to which the State Board and its administrators are by statute required to listen and respond. According to the District Court, Knight is entitled under the First Amendment to "meaningful expression," which consists of a "fair opportunity to participate" in the meet and confer process. (Juris. A. 20, 22-23). Because the essence of the meet and confer process is the right to compel the State Board to both listen and respond concerning matters of "inherent managerial policy" the District Court is holding that Knight's purported First Amendment right to "meaningful expression" entitles him to compel a listener and a response.

Recognition of a Constitutional right to compel a responsive listener is plainly contrary to the decisions of this Court. In *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979), the Court rejected the claim that the First Amendment entitled public employees to submit work-related grievances to their employer through a labor union. In its *per curiam* opinion, the Court stated definitively:

> The public employee surely can associate, and speak freely and petition openly, and he is protected by the

> First Amendment from retaliation for doing so. See Pickering v. Board of Education, 391 U.S. 563, 574-575, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968); Shelton v. Tucker, 364 U.S. 479, 5 L. Ed. 231, 81 S. Ct. 247 (1960). *But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.*

441 U.S. at 465 (footnotes omitted) (emphasis supplied). The Court also recited with favor language from the Court of Appeals for the Seventh Circuit's decision in *Hanover Federation of Teachers Local 1954 (AFL-CIO) v. Hanover Community School Corporation*, 457 F. 2d 456 (1972):

> The First Amendment right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective."

441 U.S. at 464-65. Clearly, the First Amendment does not support Knight's claim to "meaningful expression" insofar as that claim extends to the right to compel a responsive listener.

The District Court's decision also depends on the improper assumption that the First Amendment limits the discretion of public officials engaged in policymaking in deciding with whom they wish to consult. It holds that PELRA's requirement that the State Board shall formally meet and confer only with the exclusive representative has resulted in a "practice of systematically excluding non-members of MCCFA" which, it concludes, "deprives such persons of a fair opportunity to participate in the meet and confer process." (Juris. A. 24).

This Court has clearly held that the First Amendment does not interfere with the discretion of the government to choose the persons to perform governmental policymaking functions.

In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court ruled that non-policymaking employees in the Cook County Sheriff's Department could not be terminated because of their political affiliations. The Court also stated that public employees who *are* in policymaking positions, however, *could* be terminated because of their political affiliations. 427 U.S. at 367-68, 372. This principle was reaffirmed in *Branti v. Finkel*, 445 U.S. 507 (1980), where the Court ruled that assistant public defenders could not be discharged because of their political affiliations. The employees at issue in *Branti* were not within *Elrod's* "policymaker" exception because their "primary, if not the only, responsibility . . . is to represent individual citizens in controversy with the State." 445 U.S. at 519. Once again, the Court stated that public employees in policymaking positions could be discharged where "party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518.

The case at hand is far easier to resolve than the situations presented in *Elrod* and *Branti*. Here there is no question of an employee's termination, or of an employee's right to hold and express any opinion or belief. Knight will continue to hold his position with no adverse impact on his terms and conditions of employment regardless of the views he expresses or publishes. The sole question is the discretion of the State to choose with whom it wishes to privately consult concerning matters of community college policy. As *Elrod* and *Branti* recognize, the First Amendment does not limit that discretion.

As a practical matter, public officials must be granted discretion regarding with whom they wish to confer. It requires no great imagination to perceive the impossible burden which would be placed upon government by requiring as a matter of constitutional law that public officials listen and

respond to private individuals upon demand—or that such individuals be provided a "fair opportunity" to participate in choosing representatives which could then exert such compulsive power. The government must be free to choose without constitutional stricture how and with whom it wishes to conduct private consultations, or government will likely become critically impaired from performing its functions.

Such practicalities are recognized by the decisions of the Court which hold that the government need not create public forums available to any citizen who wishes to express views to public officials. As was observed by Mr. Justice Holmes, the "constitution does not require all public acts to be done in town meeting or assembly of the whole" for there "must be a limit to individual argument in such matters if government is to go on." *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915).

The Court has held that when a forum is established which is recognized as a public forum through tradition or designation, the government is under First Amendment constraints in excluding persons from voicing their views in that forum. *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Board*, 429 U.S. 167 (1976). Even if the government establishes a non-public forum, the regulations concerning its use must be reasonable and not be an effort to suppress expression merely because public officials oppose the speaker's view. *Perry Education Association v. Perry Local Educator's Association*, —— U.S. ——, 74 L. Ed. 2d 794 (1983); *United States Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114, 131 n. 7 (1981).

The meet and confer process is neither a public forum nor a non-public forum; it is not a forum at all. The meet and confer process is the government's decision to consult with

certain persons prior to making policy decisions that are within its discretion. The state has decided to require the State Board to listen and discuss such issues with the exclusive representative of professional public employees.

This element of consultation distinguishes meet and confer from both the public and non-public forums. There is no dispute that meet and confer is not a public forum, as the lower court specifically so found. (Juris. A. 22, 50).[16] The non-public forums considered by this Court have uniformly involved an asserted claim to use government property (or property peculiarly subjected to government regulation) to communicate to individuals. *See, e.g., Perry Education Association v. Perry Local Educator's Association, supra* (school mail system); *United States Postal Service v. Greenburgh Civic Associations, supra* (government regulated postal letter box); *Greer v. Spock*, 424 U.S. 828 (1976) (military base); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space on municipal transit); *Adderly v. Florida*, 385 U.S. 39 (1966) (county jail). None of the cases decided in this area have suggested that the government is under any constraints in deciding with whom it wishes to confer. As the Court noted in *City of Madison*:

> Plainly, public bodies may confine their meetings to specified subject matter and may hold non-public sessions to transact business.

429 U.S. at 175 n. 8.

Because Knight has no constitutional right to compel a responsive listener, nor a right to interfere with the state's discretion in choosing with whom to consult, the lower court's decision should be rejected.

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[16] See also discussion, *post*, at p. 21.

B. Even If The Meet And Confer Process Is Treated As A Non-Public Forum, PELRA's Requirement That The State Board Meet And Confer Only With The Exclusive Representative Of Its Professional Employees Is Not Unconstitutional.

The state's decision to engage in formal meet and confer only with the exclusive representative of those professional employees who have decided to collectively bargain is reasonable, and is not an effort to suppress expression merely because the state opposes the excluded speakers' views. For this reason, even if meet and confer is regarded as a non-public forum, it is nevertheless constitutional for the state to restrict access to meet and confer to the exclusive representative of its professional employees, where those employees have selected one.

As noted above, the lower court found that the meet and confer process is not a public forum. (Juris. A. 22, 50). The lower court's conclusion that meet and confer is not a public forum is fully consistent with this Court's analysis in *Perry Education Association v. Perry Local Educator's Association*, —— U.S. ——, 74 L. Ed. 2d 794 (1983).

Having found that meet and confer is not a public forum, however, the lower court committed clear error in ruling that the practice of limiting access to meet and confer to the exclusive representative could only be sustained "if it is supported by compelling, legitimate state interests which cannot be furthered by less intrusive means." (Juris. A. 24). With respect to non-public forums, as noted above, government regulations will be upheld if they are reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Perry Education Association*, 74 L. Ed. 2d at 805; *United States Postal Service v. Greenburgh*

Civic Associations, 453 U.S. 114, 131 n. 7 (1981). The state's decision to meet and confer only with the exclusive representative of its professional employees meets this test.

The recent *Perry Education Association* decision is dispositive on this question. There the Court upheld the school district's practice of granting the teachers' exclusive representative, the Perry Education Association ("PEA") access to the school mail system while denying to other teacher organizations similar access. The Court found that the school mail system was not a generally open public forum, but rather was a nonpublic forum which may be reserved for "its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable, and not an effort to suppress expression merely because public officials oppose the speaker's view." 74 L. Ed. 2d at 805. The restriction on access to the school mail system satisfied this standard. The Court specifically rejected the argument that a distinction between an organization certified as the exclusive representative and one not so certified was intended to discourage one viewpoint and advance another.

> We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views.

74 L. Ed. 2d at 807. The Court also found that limitation of mail box access was "reasonable." This holding was based upon the PEA's participation, as exclusive representative, in an official status with respect to the operational structure of the school district. 74 L. Ed. 2d at 808-09. The PEA had a special need for access to the school mails, and the school district had a special interest in seeing that the need was fulfilled. Further, a substantial interest in labor-peace within the

schools was fulfilled by excluding rival unions from the use of school mails. *Id.* Finally, the Court noted that substantial alternative channels of communication were available to those teacher organizations that did not hold the status of exclusive representative. 74 L. Ed. 2d at 810.

In this case the MCCFA, as exclusive representative, has the same status held by the PEA in *Perry Education Association*, and therefore the exclusion of others from meet and confer is not intended to encourage one viewpoint and discourage another. Because the State Board must meet and confer with the MCCFA as the representative of the faculty regardless of what position or view it expresses, there is no effort to suppress expression based upon the speaker's view.

The limitation of access to meet and confer to the exclusive representative is also reasonable for the reasons expressed in *Perry Education Association*. The Court found the restricted use of mails by the PEA reasonable given the PEA's exclusive status. In the instant case, the reasonableness of the restriction is even more fundamental in that it pertains to the right and the need of the State Board to deal with an exclusive agent on meet and confer issues in the first place. This Court ruled in *Abood v. Detroit Board of Education*, 431 U.S. 209, 225-26 (1977), that the interest of the state in dealing only with an exclusive agent is more than "reasonable"—it is supported by "important governmental interests" that therefore justified compelling public employees to financially support the exclusive representative, despite an "impingement on associational freedom." Relying on its prior decisions in *Railway Employers' Dept. v. Hanson*, 351 U.S. 225 (1956) and *Machinists v. Street*, 367 U.S. 740 (1961), the Court stated:

> The governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law.

> The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid.

431 U.S. at 224.

The same interests make the government's decision to meet and confer only with an exclusive representative a reasonable one.[17] The state has a right to structure and organize its consultations with employees. Indeed, even the lower court recognized that the state could require meet and confer to occur through *representatives.* (Juris. A. 22). It is eminently reasonable for the state to rely on an exclusive representative to formulate and express the views of the employees it represents. This is particularly true given the ongoing relationship between employer and exclusive representative on bargainable issues. The dividing line between bargainable and non-bargainable issues is not always clear; in many cases—such as budget retrenchment—elements of both will be present. The potential for disruption of labor peace is obvious if the employer is confronted with possibly inconsistent or conflicting demands of separate meet and negotiate, and meet and confer representatives.

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[17] The lower court specifically upheld PELRA's meet and negotiate structure, but ruled that there is less of a governmental interest in limiting access to meet and confer than in limiting access to meet and negotiate. (Juris. A. 25). As is subsequently argued, the lower court's conclusion is erroneous in this regard. *See* discussion, *post*, at pp. 35-41. It is sufficient to note here that even if the government interests are not considered "important," they are certainly "reasonable" under the standard articulated in *Perry Education*

The reasonableness of PELRA's meet and confer structure is also apparent because instructors have ample alternative means to express their views. As noted earlier, instructors may and do communicate informally with System administrators, and participate in other forums made available to all faculty.

Under *Perry Education Association*, therefore, even if the meet and confer process is characterized as a non-public forum, the state may permissibly limit participation to those persons designated by the MCCFA. *See also City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 177-178 (1976) (concurring opinion of Brennan, J., joined by Marshall, J.) (". . . the First Amendment plainly does not forbid [the state] from limiting attendance at a collective bargaining session to school board and union bargaining representatives and denying [individual employees] the right to attend and speak at the session"). Such a restriction is reasonable under the First Amendment and is not an effort to suppress expression because of its content.

C. The Lower Court Incorrectly Perceived This Case As Involving Issues Of Academic Freedom.

The lower court's conclusion that First Amendment interests were implicated in the conduct of meet and confer sessions was heavily influenced by its belief that issues of academic freedom in higher education were involved. It referred to issues considered in meet and confer as having "a special character as a matter of tradition, public policy and constitutional law." (Juris. A. 49). The lower court then relied upon

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Association. Because this case involves, at best, access to a non-public forum, rather than the compelled financial support at issue in *Abood*, the "reasonableness" standard established by *Perry Education Association* is the proper test to be applied here.

this Court's decisions in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). *Shelton v. Tucker*, 364 U.S. 479 (1960) and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) to conclude that the "vital concern for academic freedom warrants a heightened standard of scrutiny when, as here, the state regulates the forum for academic speech." (Juris. A. 21). Further, the court expressly limited its decision to the area of higher education, despite the fact that all professional public employees in Minnesota have the right to meet and confer. (Juris. A. 23 n. 19, 28 n. 21). The court's rationale relies on an erroneous assumption concerning faculty governance traditions, is incorrect as a matter of constitutional law, and has the effect of inhibiting the interests it professes to advance.

The precedent cited by the lower court recognizes the educational setting as an area of specific application of First Amendment principles. These principles, however, are not offended by PELRA's meet and confer structure because the meet and confer process does not impinge upon the educational activities historically entrusted to individual faculty members. The lower court's findings of fact include the following:

> Certain rights that might be characterized as elements of academic freedom are expressly protected by the employment contract [negotiated by the State Board and the MCCFA] *e.g.*, the right of faculty members to select their course materials and textbooks, to choose their methods of teaching, to research and publish their work, to evaluate student performance and to select library materials.

(Juris. A. 52). Meet and confer plainly does not involve such issues as compulsory loyalty oaths (as in *Keyishian*), intru-

sion by the state into the content of a professor's lectures (as in *Sweezy*), or compulsory divulgence by teachers of membership in associations (as in *Shelton*). The lower court acknowledges that such cases are not controlling here. (Juris. A. 21). The lower court offers the opinion, however, that the tradition of faculty governance is an issue of similar constitutional magnitude.

The court's view that the meet and confer process "codifies a long-standing tradition of participation in college governance" represents a misconstruction of the record and the realities of life in the Minnesota community colleges. The "meet and confer" process gave to these community college instructors a right which they had previously not enjoyed: the right to insist that the administration listen and respond to faculty views concerning non-bargainable issues as presented by a faculty representative. The record clearly establishes that prior to the passage of PELRA, instructors at the community colleges could participate in dialogue concerning campus issues only to the extent permitted by various college administrators. At some campuses, faculty participation was minimal to non-existent; at all campuses individual college presidents and administrators unilaterally determined the extent of faculty input.[18] It is unfair and unrealistic to assume that faculty governance traditions perhaps existing in a few elite, long-established colleges and universities also existed in this state-operated system of two-year community colleges. As one commentator has observed:

> We hear much weeping about the loss of shared governance on American campuses. In some respects, the weeping concerns a Magic Kingdom that never even existed; in other cases, the weeping has some real basis.

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[18] See discussion, *ante*, at p. 4.

> The ancient ritual of shared governance has rarely been practiced in modern times. Maybe it existed in the Middle Ages, or at Oxford, or at the Sorbonne; and maybe it still occurs at a few universities. But for most faculty and most institutions most of the time real shared governance is as mythical as a fable.
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> . . .
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> But in any event [the] Magic Kingdom [of shared faculty governance] is a small—no, tiny—part of the forest. In the rest of the forest, the people rarely worship shared governance. Community colleges are usually dominated by rigid bureaucracies and heavy-duty administrators. Most state colleges, born from teacher's colleges, do not even have pretentions about faculty involvement in decisions. And with a few exceptions, the liberal arts colleges are fiefdoms of presidents who, with the acquiescence of docile trustees, may call the shots, hire and fire the faculty, and decide what color the new dorm curtains will be.

J. Baldridge, *Shared Governance: A Fable About the Lost Magic Kingdom*, 68 *Academe* 12, 13 (1982).[19] The establishment of a legislatively mandated meet and confer process in Minnesota was a victory for community college instructors desiring to effectively consult with the administration on non-

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[19] This Court has recognized that the faculty governance traditions of "mature" universities do not necessarily exist in other institutions of higher learning. *NLRB v. Yeshiva University*, 444 U.S. 672, 690 n. 31 (1980). Nowhere is this more likely to be true than in state-created, two-year community college systems. Begin, Settle and Alexander, *The Emergence of Faculty Bargaining*, published in *Campus Employment Relations*, 139 (Tice, ed. 1976); K. Mortiner and T. McConnell, *Sharing Authority Effectively* 54-55 (1978). With respect to such institutions, the observations of Mr. Justice Brennan, dissenting in *Yeshiva*, seem particularly appropriate: ". . . the university of today bears little resemblance to the 'community of scholars' of yesteryear". 444 U.S. at 702.

bargainable issues. It was not a codification of a pre-existing practice. To the extent the lower court's invocation of academic freedom relies on such an assumption, its rationale is incorrect and must be rejected.

The lower court acknoweldged that there is no precedent for its reliance on academic freedom in support of individual instructors' rights to participate in meet and confer—*i.e.*, to require the State Board to listen to their views and respond. (Juris. A. 21 n. 16). In fact, faculty members at institutions of higher learning have in the past attempted unsuccessfully to assert a constitutional right to participate in collegiate decision-making. In *Johnson v. Board of Regents*, 377 F. Supp. 227, 238 (W.D. Wisc. 1974), the court rejected the argument that the faculty of a state university system had a constitutional right to participate in the decision-making process resulting in termination or layoff of faculty members, including the selection of faculty members to be affected, based on enrollment or fiscal considerations. Similarly in *Gonzales v. Irizarry*, 387 F. Supp. 942 (D.P.R. 1974), the court rejected a constitutional attack by members of a public university faculty concerning the rules established to govern election to a faculty senate. The rules allowed certain faculty members to serve on the faculty senate for more than two consecutive terms while barring other faculty members from being elected to more than two consecutive terms. The court rejected the plaintiffs' attack based on free association, free expression and equal protection grounds stating it would not equate voting for members of the academic senate with the right of political freedom and association. 387 F. Supp. at 946.[20]

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[20] *See also Peacock v. Board of Regents*, 380 F. Supp. 1081, 1085 (D. Ariz. 1974) (holding that democratic principles while defensible as a matter of policy, are not constitutionally required in institutions of higher learning).

From these cases it is clear that the lower court's decision is not only premised on unsupported assumptions concerning the tradition of faculty governance, it is contrary to precedent which holds that the Constitution does not dictate governance structure at institutions of higher education.

The lower court's order also has the ironic effect of undermining the interests it purports to support. It states that public policy supports participation by faculty in deciding issues within the scope of meet and confer—issues which it describes as having a "special character as a matter of tradition, public policy and constitutional law." (Juris. A. 20). The meet and confer process established by PELRA is a part of an overall framework for establishing balanced public employee labor relations central to which is the principle of exclusivity. As discussed earlier, the benefits of exclusivity to the government make it a reasonable structure for conferring with employees.[21] The benefits to the instructors are more patent. By focusing the full weight of employee desires through a single representative, employees can more effectively achieve their goals. The lower court's rejection of exclusivity in favor of independently elected meet and confer committees results in the potential for those committees to be internally divided and unable to present a uniform position. Such internal division decreases the impact that the faculty can have on the decisions which are subject to meet and confer.

This Court has recognized the fundamental proposition that employees' strength is increased through collectivization. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 61-62 (1975); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-181 (1967). This fundamental

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[21] See discussion, *ante*, at pp. 23-25.

principle underlying collective bargaining is just as applicable to meet and confer subjects as it is to negotiated terms and conditions of employment. A primary factor causing faculty members to choose an exclusive representative is the ineffectiveness they have experienced in dealing with college administrations through less organized procedures. Feller and Finken, *Faculty Bargaining In Public Higher Education*, published in *Faculty Bargaining In Public Higher Education: A Report of the Carnegie Council on Policy Studies in Higher Education*, 131 (1977). Exclusive representation *enhances* faculty input, rather than detracting from it.

In summary, the lower court's decision cannot be supported by reference to principles of academic freedom. The decision assumes traditions of faculty governance which do not exist. It is incorrect as a matter of constitutional law. It also serves to weaken the impact of faculty participation in college decision-making which it purports to advance.

D. PELRA Provides A "Fair Opportunity To Participate" In The Selection Of The Meet And Confer Representative.

Even if the lower court's thesis is accepted that the First Amendment principles of free speech or free association require the state to provide Knight with a "fair opportunity to participate" in the selection of meet and confer committees, PELRA provides that "fair opportunity." PELRA establishes comprehensive procedures for the selection of the exclusive representative through a democratic process supervised by an independent state agency, the Bureau of Mediation Services. Minn. Stat. § 179.67 (1982). All faculty members, regardless of their affiliations, may participate in this process, just as they participated in the process of selecting the faculty senates

or councils (on those campuses where such bodies existed). The statute also provides that dissatisfied employees may petition for replacement or disestablishment of the exclusive representative. This procedure allows a "fair opportunity to participate in the selection of governance representatives" if the First Amendment be thought to impose such a requirement.[22]

Knight's complaint arises from the fact that the MCCFA, and not Knight and his colleagues (or any organization they are entitled to form), has been selected by the majority of the faculty to be their meet and confer representative. Because the selection of the exclusive representative has occurred on a democratic basis encompassing all faculty, the fact that non-MCCFA members have not, as a matter of practice, been selected by the MCCFA to express its position as members of meet and confer committees is of no constitutional significance. Certainly a faculty senate may choose its committees from among senate members, without being constitutionally required to appoint faculty members who were not elected to the body. For constitutional purposes, the MCCFA's selection of meet and confer committees is no different.

This argument was noted but not persuasively refuted by the lower court. (Juris. A. 27-28). Viewed in this light, the lower court is actually holding that the First Amendment prohibits the state from requiring the selection of a "meet and negotiate" representative and a "meet and confer" representative at the same time, on the same ballot. The court is ruling

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[22] The lower court asserts that PELRA provides no procedures for selecting a meet and confer representative. (Juris. A. 19 n. 14). This may be true where a unit of professional employees does not engage in meet and negotiate. Because the MCCFA is both a meet and negotiate, and meet and confer representative, however, it is required to submit to the elaborate election process described above.

that professional employees must have separate votes for the "meet and negotiate" and "meet and confer" representatives. Moreover, the lower court's subsequent ruling requiring cumulative voting in meet and confer elections appears to require that there be more than one meet and confer representative, contrary to PELRA's language.[23] Even assuming that the First Amendment establishes a "fair opportunity to participate" requirement in this context, there is no constitutional basis for the court's ruling that the state must conduct a two-tiered selection process for the two functions, or that several meet and confer representatives must be selected.

The existence under PELRA of a "fair opportunity to participate" in the democratic selection of the meet and confer representative also refutes the lower court's asserted infringement of Knight's free association rights. The lower court suggests that aside from infringement of free speech interests, the meet and confer process "also infringes the First Amendment associational rights of faculty members who desire not to join the MCCFA." (Juris. A. 24). This alleged infringement arises because the ability to serve on a meet and confer committee is "completely lost unless one joins the MCCFA." (Juris. A. 28). Further, the court asserts the "right [of nonmember instructors] to speak out is further impaired by the knowledge that one could be excluded from serving in the process if the MCCFA should desire to retaliate for protected speech activity." (Juris. A. 24).

The court's reasoning is flawed because it forwards as a constitutional infringement what are the inevitable consequences of any democratic representational system. With respect to the lower court's assertion of potential retaliation,

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[23] See discussion, *post*, at p. 43.

it is important to note that the court found no evidence that such retaliation had occurred. (Juris. A. 52). More fundamentally, it is essential to any selection process that the views of the potential representative be taken into account. Certainly instructors voting in the separate meet and confer election envisioned by the lower court's decision would properly consider the views of those running in deciding for whom to vote. If not being voted for or selected as a representative because of one's views is termed "retaliation," then such "retaliation" is a fairly common occurrence. If desire to be selected inhibits a person from speaking his true mind, then such an inhibition can hardly be called unconstitutional. Such "retaliation" and "inhibition," if those labels be used, are inherent in any system for the democratic election of representatives. *Branti v. Finkel*, 445 U.S. 507, 533 (1980) (Powell, J., dissenting) ("[No candidate for elected public office may] contend seriously that the voters' decision not to re-elect him because of his political views is an impermissible infringement upon his right of free speech or affiliation.")

The same analysis disposes of the lower court's suggestion that instructors may feel compelled to join the MCCFA in order to participate in the meet and confer process. Non-MCCFA members are not compelled to join the MCCFA in order to participate in the meet and confer process insofar as they are entirely free to participate in the selection of the exclusive representative. The amount of influence which the minority may exert on the majority-selected representative—with regard to the positions taken by that representative, or the persons which the representative chooses to express its positions—may vary according to a number of factors, none of which rises to the level of a constitutionally cognizable compelled association. Republicans living in a district which has

historically sent only Democrats to Congress may feel in some sense "compelled" to join the Democratic Party in order to maximize their influence on issues of importance to them. No one would claim that such "compulsion" violates the First Amendment. Any "compulsion" experienced by a non-MCCFA member is of the same nature. Once it is agreed that a system of democratic representation is to be used,[24] those in the minority will always experience such pressure. The existence of such pressure does not render democratic representation unconstitutional.

In short, PELRA provides Knight with a "fair opportunity to participate" in the selection of a meet and confer representative. No unconstitutional infringement of associational rights occurs as a result of this democratic procedure.

E. Compelling Governmental Interests Support The Meet And Confer Structure Established By PELRA And Override Any Infringement Of First Amendment Interests.

The lower court ruled improperly, as argued above, that the meet and confer structure implemented by PELRA "infringes fundamental First Amendment guarantees." (Juris. A. 24). It further concluded that the meet and confer structure, as applied by the State Board and the MCCFA, was unsupported by "compelling, legitimate state interests which cannot be furthered by less intrusive means." (Juris. A. 27). The district court's conclusion should be rejected.

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[24] The lower court upheld the requirement of a democratic selection process, noting that a requirement that the State Board meet and confer upon the demand of any instructor could cause the result that "no meaningful faculty expression would emerge and that both faculty and administration would be deprived of the benefits from an orderly, systematic exchange of views." (Juris. A. 22).

PELRA persuasively states the interest which it seeks to achieve:

> The relationships between the public, the public employees, and their employer governing bodies imply degrees of responsibility to the people served, need of cooperation and employment protection which are different from employment in the private sector. So also the essentiality and public desire for some public services tend to create imbalances in relative bargaining power or the resolution with which either party to a disagreement presses its position, so that unique approaches to negotiations and resolutions of disputes between public employees and employers are necessary.
>
> Unresolved disputes between the public employer and its employees are injurious to the public as well as to the parties; adequate means must therefore be established for minimizing them and providing for their resolution. Within the foregoing limitations and considerations the legislature has determined that overall policy may best be accomplished by:
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> (1) granting to public employees certain rights to organize and choose freely their representatives;
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> (2) requiring public employers to meet and negotiate with public employees in an appropriate bargaining unit and providing for written agreements evidencing the result of such bargaining; and
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> (3) establishing special rights, responsibilities, procedures and limitations regarding public employment relationships which will provide for the protection of the rights of the public employee, the public employer and the public at large.

Minn. Stat. § 179.61 (1982). Within this overall framework, PELRA establishes the meet and confer framework in order

"to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas." Minn. Stat. § 179.73 (1982). Given the important objective of obtaining input from professional employees within a framework which promotes labor peace, the reliance on the exclusive bargaining representative to be the meet and confer representative is supported by compelling government interests.

The importance of the exclusivity principle, and the rationale underlying it, have been discussed earlier.[25] Briefly summarized, exclusivity avoids confusion in the presentation of employee views, avoids subjecting the employer to conflicting demands and minimizes the development of rivalries within the bargaining unit which would disrupt labor peace and detract from the benefits of collectivization.[26] Without

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[25] See discussion of the "reasonableness" of PELRA's meet and confer structure, *ante*, at pp. 24-25.

[26] Among the stipulations entered into between Knight and the State Board are the following, which bear upon the state's interests in such matters:

3. The goal of "labor peace"• is as important in the relationship between a public employer and its employees as it is between a private employer and its employees.

4. A statutory system which permits employees in a unit to be represented by an exclusive representative results in the avoidance of confusion, conflicting demands, and dissension that would result from more than one representative claiming to represent all the employees in said employee unit.

5. The State of Minnesota has a legitimate interest in maintaining "labor peace" by entering into agreements with an exclusive representative for each employee unit, which agreements are not subject to direct challenge by rival employee organizations claiming to represent the same employees in each unit.

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• [footnote] "Labor peace" as used in this stipulation and at all other places herein is defined as a stable relationship between employer and employees which is characterized by the absence of work stoppages, work slowdowns, or unresolved disputes, and by the efficient continuation of public business and services. (A. 38).

exclusivity, there is a problem of inconsistency not only within the meet and confer team, but also between the meet and confer and meet and negotiate team.

The lower court recognized that interests such as these were sufficiently compelling to uphold the exclusivity principle where negotiation of terms and conditions of employment are concerned, consistent with this Court's ruling in *Abood v. Detroit Board of Education*, 431 U.S. 209, 220-21, 224 (1977). The lower court found the interests less than compelling, however, when applied to meet and confer. The lower court's reasoning does not withstand scrutiny.

The court asserts that, unlike other professional employees, community college faculty members do not need the impact of being represented in meet and confer by an exclusive representative because of the tradition of shared decision-making in higher education. (Juris. A. 25). As argued above, the court's assumption that such a tradition existed is not persuasive with respect to the community colleges here at issue.[27] Moreover, the court impliedly agrees that the faculty governance opportunities available prior to PELRA were inadequate with respect to items now subject to meet and negotiate procedures. If pre-PELRA "shared decision making" was inadequate for "meet and negotiate" subjects, it was just as inadequate for "meet and confer" subjects.

The lower court also asserts that exclusivity is less needed because "intangible" issues are involved in meet and confer, as opposed to the "tangible fruits" of negotiations over terms and conditions of employment. (Juris. A. 25-26). The labeling of a matter as "intangible" does not make it unimportant. Decisions made as a result of the meet and confer process on such

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[27] See discussion, *ante*, at pp. 27-29.

matters as curriculum and overall budget will have substantial impact on the instructors in the bargaining unit. Curriculum decisions, for example, substantially affect the academic qualifications and number of instructors who will be on the faculty. The lower court concedes the importance of these issues by describing meet and confer as an "important academic forum" where the faculty "resolve virtually every issue outside the scope of mandatory bargaining." (Juris. A. 22). The resolution of these issues provides benefits to MCCFA members and non-members alike just as does the negotiation of terms and conditions of employment in meet and negotiate. A unified faculty voice forwarded by an exclusive representative is just as important where the "intangible" issues of meet and confer are concerned, as in the negotiation of employment conditions.

The lower court argues that the MCCFA's security as the meet and negotiate representative will not be threatened by an independent meet and confer team. This contention misses the point. The principle of exclusivity in meet and confer is supported by the compelling interests stated above regardless of any impact on the negotiations process. The contention is also wrong. There will be an inevitable interplay between the meet and negotiate, and meet and confer procedures. The history of the litigation of PELRA's scope of mandatory negotiation before the Minnesota Supreme Court teaches that the line between the two areas is not clear. For example, in *Minneapolis Federation of Teachers v. Minneapolis Special School District No. 1*, 258 N.W. 2d 802 (Minn. 1977), the Minnesota Supreme Court interpreted PELRA to require that a school district meet and negotiate concerning criteria and procedures for intra-district teacher transfers, but not the decision to transfer itself. According to the court, the transfer criteria and procedures "directly affect a teacher's welfare" and there-

fore were negotiable. 258 N.W. 2d at 805. In *Minneapolis Association of Administrators and Consultants v. Minneapolis Special School District No. 1*, 311 N.W. 2d 474 (Minn. 1981), however, the court (in a 5-4 decision) refused to require the school district to meet and negotiate alterations in supervisory employees' duties, assignments and salaries, despite a finding that the action had "substantial consequences for the employees involved." 311 N.W. 2d at 477. Most recently, the court ruled in *Ogilvie v. Independent School District No. 341*, 329 N.W. 2d 555 (Minn. 1983) that a school district must negotiate criteria for selecting teachers for transfer between school districts, but on the basis of a different standard—that such an issue was "not likely to hamper the school board's direction of educational objectives." Obviously, the determination under PELRA of which subjects are negotiable and which areas are not is fraught with difficulty and unpredictability.

Because of the uncertainty as to which procedure a matter should be submitted to, there is obvious potential for conflict between the meet and confer, and meet and negotiate teams. Such a conflict presents a clear threat to the bargaining representative's status. Further, in areas where elements of both mandatory and non-mandatory bargaining subjects are involved—*e.g.*, budget retrenchment or transfer—conflicting positions between the committees might well lead to further confusion or detriment to the faculty. The lower court is wrong, therefore, in its assertion that an independent meet and confer team would pose no threat to the security of the exclusive bargaining representative. For the same reasons, the lower court is incorrect in its assertion that the State Board would not be subjected to irreconcilable, conflicting demands. (Juris. A. 27). At best, the community college administration will face conflicting demands. At worst, the adminis-

tration will play one group off against the other in order to achieve its own ends. For these reasons, the rationale supporting exclusivity in the formal "meet and confer" process is just as compelling as in the "meet and negotiate" arena. If First Amendment interests are at all infringed by the PELRA meet and confer structure, compelling state interests justify such an infringement.

II. THE DISTRICT COURT'S SUPPLEMENTAL ORDER REQUIRING THAT CUMULATIVE VOTING BE USED IN MEET AND CONFER ELECTIONS IS WITHOUT CONSTITUTIONAL BASIS.

In its order of April 5, 1983, (A. 190), the lower court improperly ruled that a "fair opportunity to participate" in any separate meet and confer elections required the use of cumulative voting. This requirement is wholly unprecedented, and exceeds even the measures taken in the sensitive area of alleged racial discrimination in the election of candidates to public office.

The lower court's ruling depends on a factual finding which does not justify its extreme response. The lower court found:

> As long as MCCFA members continue to constitute a majority of the faculty persons voting and they vote for the union endorsed slate, no non-MCCFA member can ever be elected.

(A. 191). To remedy this perceived deficiency, the court ordered a cumulative voting system under which each voter would have a number of votes equal to the number of committee members being chosen, with the right to concentrate or distribute the votes among the candidates as desired. This system, the court found, would "ensure" that non-union faculty members will be able to elect at least one representative as-

suming a minimum number of non-union faculty exist and that they concentrate their votes. In essence, the lower court ruled that the First Amendment requires a voting scheme which will result in proportional representation of members and non-members on meet and confer committees.

The lower court cites no precedent for the proposition that the First Amendment requires either cumulative voting or proportional representation, and there is none. In fact, there appear to be no reported cases in which such a proposition has been urged.

In cases where systems for the election of public officials have been challenged on the basis of the Equal Protection Clause of the Fourteenth Amendment, the notion that the Constitution requires proportional representation has been rejected. The Court has held that, while the Constitution confers a right to "participate in elections on an equal basis with other qualified voters," it does not entitle a group in the minority to elect candidates in proportion to its numbers. *Mobile v. Bolden*, 446 U.S. 55, 75-78 (1980) (plurality opinion). Even if this case were held to be analogous to those involving alleged discrimination in the voting for public officials, it is plain that the lower court erred in determining that meaningful participation in the meet and confer process necessitated that the minority group to which the plaintiffs belong be ensured of electing its own representative.

Of particular interest is the Court's decision in *Whitcomb v. Chavis*, 412 U.S. 755 (1973). In reversing the district court's ruling that the Constitution required the disestablishment of a multi-member legislative district in favor of several single-member districts for elections to the Indiana legislature, the Court criticized as "not easily contained" the lower court's underlying rationale of required representation of minority

interests. 403 U.S. at 156. In discussing the extreme consequences which might result, the Court stated:

> Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting . . .

Id. The Court rejected this approach, stating that it was "unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them." 403 U.S. at 160.

A cumulative voting requirement is particularly inappropriate where imposed in a context of collective bargaining. PELRA requires that there be a *single* meet and confer representative, and where a unit of professional employees have decided to collectively bargain that meet and confer representative is the exclusive bargaining representative. The lower court's order necessarily requires that there be a number of meet and confer representatives as a logical pre-condition for cumulative voting. The cumulative voting requirement therefore not only prevents employees from having an exclusive representative for both meet and negotiate, and meet and confer purposes, it also prevents employees from having a single meet and confer representative. The court's decision is analogous to a holding that the State of Minnesota may not have a single governor, but must have a panel of several governors to ensure minority representation. No such constitutional requirement exists. Certainly the interests in and benefits of exclusive representation in the area of labor relations, discussed at length above,[28] are grounds for rejecting such a proposition in this case.

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[28] See discussion, *ante*, at pp. 35-41.

The lower court's requirement of cumulative voting in meet and confer elections must be rejected. It is unsupported by constitutional precedent. And by ensuring that the exclusive representative of community college faculty members is no longer exclusive, it defeats important state interests.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING APPELLEES TWENTY PERCENT OF THEIR COSTS.

Under Rule 54(d) of the Federal Rules of Civil Procedure, the allowance of costs is largely left up to the discretion of the trial court. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 232 (1964). That discretion, however, is to be exercised in accordance with recognized equitable principles, and the court's award will be set aside if an abuse of discretion is established. *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1, 11 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950). The lower court committed such an abuse of discretion in this case because its order that twenty percent of plaintiffs' costs be assessed against the State Board and the MCCFA is unrelated to the proportion of the proceedings below attributable to the issue on which Knight succeeded, and results in the MCCFA and State Board being required to subsidize conduct by Knight and his counsel which unreasonably and unnecessarily bloated this litigation.

The "meet and confer issue" was a very small portion of a major assault by Knight on the constitutionality of PELRA and the right of the MCCFA and the other appellant labor organizations to constitutionally function within PELRA's framework. Knight expended enormous time and energy in attempting to prove that the appellant labor organizations are

an "integrated" organization which is the constitutional equivalent of a "political party" and is engaged in a collective bargaining process which amounts to "fascism". (Juris. A. 4-5). This effort included a large amount of discovery directed towards these issues, and a substantial appellate practice in challenging lower court discovery orders, challenges routinely rejected as without foundation. *See Knight v. Heaney*, 444 U.S. 821 (1979) (denying motion for leave to file writ of mandamus); *In re: Knight*, 614 F. 2d 1162 (8th Cir. 1980) *petition for rehearing en banc denied*, 614 F. 2d 1162 (8th Cir. 1980) *cert. denied* 449 U.S. 823 (1980).

In denying appellants' motion for an amended judgment on the costs issue, the district court stated:

> Defendants' motion to reduce the proportion of costs taxed against them is grounded on their contention that no more than 5-6 percent of the plaintiffs' efforts were expended on the "meet and confer" issue, the one issue on which plaintiffs prevailed. Plaintiffs have not disputed that the "meet and confer" issue was largely a discrete question of law and fact. Nor have they challenged defendants' assertions that the "meet and confer" issue was addressed in only 3 percent of plaintiffs' exhibits, 6 percent of the trial transcripts, .004 percent of plaintiffs' proposed stipulations and by none of plaintiffs expert witnesses.

(Juris. A. 2). Despite this recognition of the small and discrete nature of the meet and confer issue, the court adhered to its twenty percent cost award. As rationale it offered an observation, inconsistent with the statement quoted above, that there is "overlap between the First Amendment claim as to meet and confer practices and other practices challenged by plaintiffs." *Id.*

The lower court was correct in its initial assertion that the meet and confer issue was a "largely discrete question of law and fact." The only overlap between the two sets of claims was that both purported to invoke the First Amendment of the Constitution. Beyond that, the meet and confer issue had nothing in common with Knight's other claims.

The lower court was justified in its decision to apportion costs, based on the limited nature of Knight's success in this case. Ample precedent upholds apportionment in such circumstances. *See, e.g., Scientific Holding Co. v. Plessey, Inc.*, 510 F. 2d 15, 28-29 (2d Cir. 1974); *K-S-H Plastics, Inc. v. Carolite, Inc.*, 408 F. 2d 54, 60 (9th Cir. 1969); *Commonwealth of Pennsylvania v. Local Union 542, I.U.O.E.*, 507 F. Supp. 1146, 1152-54 (E.D. Pa. 1980); *Steel Construction Co. v. Louisiana Highway Comm'n*, 60 F. Supp. 183, 192-93 (E.D. La. 1945). The specific apportionment which was made, however, constituted an abuse of discretion because it bears no rational relationship to the degree of Knight's success; in no way did the "meet and confer issue" amount to twenty percent of this case. This is clear from the uncontroverted analysis of the proceedings presented to the trial court by the appellant labor organizations pertaining to trial transcripts, exhibits, stipulations and expert testimony.

Not only does the lower court's apportionment of costs lack a rational relationship to Knight's limited success, it also has the effect of requiring the MCCFA and the State Board to subsidize conduct by Knight and his counsel which caused this case to be unreasonably protracted. Where such conduct exists, any apportionment of costs should protect the opposing party from being forced to provide such a subsidy. In *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1, 11 (7th Cir. 1949), *cert. denied* 338 U.S. 948 (1950), the court stated the

denial of costs or assessment of partial costs to a prevailing party should be made under circumstances like these.

> As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty for some defection on his part in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record . . .

176 F. 2d at 11. *See, also, ADM Corp. v. Speedmaster Packaging Corp.*, 525 F. 2d 662, 665 (3d Cir. 1975) (trial court has the authority to deny costs when prevailing party unduly extended and complicated resolution of issues); *Jones v. Schellenberger*, 225 F. 2d 784, 794 (7th Cir. 1955), *cert. denied* 350 U.S. 989 (1956) (court denied victor costs because of reprehensible conduct prolonging and greatly increasing costs of suit).

The lower court severely criticized Knight and his counsel for the manner in which this litigation was conducted:

> Much of the present litigation has been a wasteful attempt to obfuscate and circumvent that clear holding [of *Abood v. Detroit Board of Education, supra.*]

(Juris. A. 5 n. 2). The court further described appellees' theories as "frivolous" ones which could have been presented without the need for a trial of facts.

> Instead, the development of this theory was muddled with plaintiffs' theory that MCCFA, and probably any public sector union, is the constitutional equivalent of a political party, and was further blurred with repeated incantations that the arrangement under PELRA is the functional equivalent of Italian fascism and the National Industrial Recovery Act. *Indeed, the presentation of plaintiffs' case*

has hindered rather than helped the court to resolve the issues raised in their complaint.

(Juris. A. 4). (emphasis supplied).

Given the district court's recognition of the wasteful and unreasonable conduct of Knight and his counsel on the non "meet and confer" issues, the court's ruling requiring the appellants to financially support the costs of that conduct is an abuse of discretion.

CONCLUSION

Based on the foregoing, the appellant labor organizations respectfully request that paragraphs 1, 2 and 3 of the District Court's Order for Judgment, contained in its March 30, 1982, order, be reversed. Should the Court affirm with respect to the March 30, 1982, order, the appellant labor organizations request reversal of the portion of the District Court's order of April 5, 1983, which requires use of cumulative voting in meet and confer elections. Finally, should the Court affirm with respect to the March 30, 1982, order, the appellant labor organizations request reversal of that portion of the order which requires the MCCFA and State Board to pay Knight twenty percent of his costs.

Respectfully submitted,

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No. 82-898

IN THE

Supreme Court of the United States

October Term, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION,

Appellants,

vs.

LEON W. KNIGHT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF OF APPELLANT MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES

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QUESTIONS PRESENTED

1. Whether public community college faculty members have a right under the First and Fourteenth Amendments to the United States Constitution to participate in discussions concerning non-negotiable policy matters between the faculty members' public employer and their exclusive representative which are held pursuant to a state public employment labor relations law and corresponding negotiated contract provisions.

2. Whether a cumulative voting system is required by the First and Fourteenth Amendments to the United States Constitution to ensure that public community college faculty members who do not belong to the faculty's exclusive representative have a fair opportunity to participate in discussions concerning non-negotiable policy matters between the public employer and the faculty's elected representative.

3. Whether the district court abused its discretion in awarding plaintiffs 20 percent of their costs in this case.

PARTIES TO THE PROCEEDING

The caption of this case which contains the names of all parties to the proceeding before the three-judge United States District Court whose judgment on the above-stated question Appellants seek to have reviewed is as follows:

Leon W. Knight, Morgan Kjer, Donald A. Dahlin, James D. Wallace, Terrence D. Florin, William B. Bauman, Harold J. Gardner, Thomas J. Patin, Eugene D. Mielke, Dr. Richard A. Thompson, David R. Grout, Joan M. Farkas, Gary Lee Nelson, Ronald Lievense, Lucille Johnson, Virginia E. Lanegran, Max A. Malmquist, Ralph G. Powell, Richard D. Isenhart, Cresston Gackel, Plaintiffs.

v.

Minnesota Community College Faculty Association; Minnesota Education Association; Independent Minnesota Political Action Committee for Education; National Education Association; James A. Norman, individually and in his former official capacity as President, Minnesota Community College Faculty Association; James K. Durham, individually and in his official capacity as Vice President, Minnesota Community College Faculty Association; Robert Bell, individually and in his official capacity as Secretary, Minnesota Community College Faculty Association; Calvin Minke, individually and in his official capacity as Treasurer, Minnesota Community College Faculty Association; Ralph S. Chesebrough, individually and in his official capacity as Executive Secretary, Minnesota Community College Faculty Association; Donald Holman, individually and in his official capacity as Minnesota Education Association Representative, Minnesota Community College Faculty Association; William M.

Mondale, individually and in his former official capacity as President, Minnesota Education Association; James Rosasco, individually and in his former official capacity as President, 1973-1974, Minnesota Education Association; Alfred F. Provo, individually and in his former official capacity as Treasurer, Minnesota Education Association; Albert L. Gallop, individually and in his official capacity as Executive Director, Minnesota Education Association; Fulton B. Klinkerfues, individually and in his former official capacity as President, Independent Minnesota Political Action Committee for Education; Janet R. Morgan, individually and in her former official capacity as Vice President, Independent Minnesota Political Action Committee for Education; John W. Schutt, individually and in his official capacity as Treasurer, Independent Minnesota Political Action Committee for Education; James A. Harris, individually and in his former official capacity as President, National Education Association; Helen D. Wise, individually and in her former official capacity as President, 1973-74, National Education Association; Catherine O'C. Barrett, individually and in her former official capacity as President, 1972-1973, National Education Association; Terry E. Herndon, individually and in his official capacity as Executive Secretary, National Education Association; Sam E. Lambert, individually and in his former official capacity as Executive Secretary, 1972-1973, National Education Association; Raymond Crippen, Rosemary McVay, John Sontorovich, Hugh V. Plunkett III, Arleene Nychklemoe, Douglas Alan Bruce, Ronald H. Denison, Edward G. Ziegler, Val Bjornson, Charles Swanson, individually; Philip C. Helland, individually and in his

official capacity as Chancellor of the Minnesota Community Colleges; John F. Helling, individually and in his official capacity as President, North Hennepin Community College; Dale A. Lorenz, individually and in his official capacity as President, Normandale Community College; Neil Christenson, in his official capacity as President, Anoka-Ramsey Community College; Wayne S. Burggraaff, in his official capacity as Minnesota Commissioner of Finance; James Lord, in his official capacity as Minnesota State Treasurer; Peter Obermeyer, in his official capacity as Director of the Minnesota State Bureau of Mediation Services; Willard H. McGuire, in his official capacity as President, National Education Association; Roger Johnson, in his official capacity as Chairman, Independent Minnesota Political Action Committee for Education; Donald C. Hill, in his official capacity as President, Minnesota Education Association, Toyse Kyle, Elma Ponto, Joseph Norquist, Nadine Chase, Paul Brinkman, in their official capacities as members of the Minnesota State Board for Community Colleges, Defendants.

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IN THE

Supreme Court of the United States

No. 82-898

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION,

Appellants,

vs.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

BRIEF OF APPELLANT MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES

OPINION BELOW

The opinion of the three-judge United States District Court has not been officially reported. It is set forth in the Appendix to Jurisdictional Statement (App. to Jur. St.) at p. A-7. The District Court's Findings of Fact are set forth in the Appendix to Jurisdictional Statement at p. A-32. A subsequent order of the district court which is also the subject of this appeal is set forth in the Joint Appendix (J.A.) at p. A-190.

JURISDICTION

The Minnesota State Board for Community Colleges appealed from the judgment entered on March 31, 1982, of a three-judge United States District Court convened pursuant to 28 U.S.C. §§ 2281, 2284. Post-trial motions for relief from judgment, for a new trial, to alter or amend the judgment, and for a hearing on an award of attorneys' fees were denied by the court on August 13, 1982. A notice of appeal to this Court was filed in the United States District Court, District of Minnesota, Fourth Division, on October 1, 1982. The Court's order noting probable jurisdiction in this case and consolidating this appeal, case No. 82-898, with another appeal from the same action, No. 82-977, was entered on March 28, 1983. On June 6, 1983, this Court granted the motion of appellants in case No. 82-977 to expand the record and enlarge the questions for review.

The Supreme Court is vested with jurisdiction over this appeal by 28 U.S.C. § 1253.

STATUTES INVOLVED

The district court declared unconstitutional as applied Minn. Stat. § 179.66, subd. 7. This statute is reproduced in the Appendix to Jurisdictional Statement at p. A-91.

Other relevant sections of Minnesota's Public Employment Labor Relations Act are reproduced in the Appendix to Jurisdictional Statement at p. A-87 *et seq.*

The appeal of the labor organizations, case No. 82-977, which was consolidated with this appeal and which is discussed herein involved Rule 54(d), Fed. R. Civ. P., which is reproduced in the Jurisdictional Statement of Appellant Labor Organizations at p. 3.

STATEMENT OF THE CASE

This is an action challenging on First and Fourteenth Amendment grounds portions of Minnesota's Public Employment Labor Relations Act (PELRA) as it applies to faculty members in Minnesota's community college system. This action was initiated on December 17, 1974 by a group of 20 community college faculty members. After a lengthy trial before a special master, a three-judge federal district court panel held that the "meet and confer" provision of PELRA as applied in Minnesota's community colleges violated the plaintiffs' First and Fourteenth Amendment rights insofar as they were effectively precluded from participating in the meet and confer process.

A. The Parties.

The Minnesota community colleges are public post-secondary two-year educational institutions under the jurisdiction and control of the appellant, Minnesota State Board for Community Colleges (Board). Minn. Stat. § 136.60, subd. 1 (1982). At the time of the trial there were 18 community colleges under the Board's jurisdiction. (R. 396-397). Each college is under a president and the presidents report to the chancellor, the chief executive officer of the system. (R. 395-398). Faculty at the 18 community college campuses comprise a single bargaining unit which since 1971 has been represented by the appellant Minnesota Community College Faculty Association (MCCFA). The MCCFA is an employee organization formally affiliated with the appellants, Minnesota Education Association (MEA) and the National Education Association (NEA). (Findings of Fact, App. to Jur. St. A-37).

The plaintiffs below are 20 community college faculty members who are part of the bargaining unit of community college faculty members represented by the MCCFA but who are not members of it, the MEA, or the NEA. (Findings of Fact, App. to Jur. St. A-34). The plaintiffs oppose representation by the MCCFA in meet and confer and seek to be directly involved in that process. (Findings of Fact, App. to Jur. St. A-34-A-35).

B. Faculty Governance Prior To PELRA.

The community college system was formed pursuant to legislation passed in 1963 which combined a number of public two-year colleges that were being run by local school districts. Minn. Laws 1963, ch. 837, section 29. Prior to the adoption of PELRA in 1971, there were a variety of internal faculty governance structures existing in the community colleges. The structures varied from campus to campus and ranged from very authoritarian college presidents who allowed only minimal faculty involvement in administrative decisionmaking to more democratically operated campuses with considerable faculty involvement through influential faculty senates. (J.A. A-45-A-46, A-67-A-68, A-106-A-108, A-112, A-114-A-128, A-157-A-158). The record does not contain details of which colleges had faculty senates and which did not or exactly how faculty were involved in governance at all the colleges. Evidence of specific faculty governance systems is limited to only three of the 18 community colleges. (J.A. A-109-A-110, A-114-A-115, A-157-A-158).

Some faculty governance structures operated through elected representatives while others were general faculty assemblies. (Findings of Fact, App. to Jur. St. A-49). Usually,

at the colleges where a faculty governance structure existed, each faculty member was eligible to participate either directly or indirectly through a representative selection process. (Findings of Fact, App. to Jur. St. A-48-A-49). With the adoption of the first contract between the Board and the MCCFA in 1973, the faculties' governance structures were abandoned. (Findings of Fact, App. to Jur. St. A-49).

Irrespective of the level of faculty involvement in governance, the Board and its college administrations always maintained final policy and rulemaking authority. (J.A. A-53, A-67). Whether through faculty governance or the meet and confer process, faculty input was purely advisory and nonbinding.

C. Public Employment Labor Relations Act Of 1971.

In 1971 the Minnesota Legislature adopted the Public Employment Labor Relations Act, Minn. Stat. §§ 179.61 *et seq.* (1982). Its principal purpose is to establish "orderly and constructive relationships between all public employers and their employees . . . ." Minn. Stat. § 179.61 (1982) (App. to Jur. St. A-87). To this end, PELRA creates a system whereby public employees are divided into appropriate bargaining units. Minn. Stat. § 179.71, subd. 3 (1982). The members of each unit may decide if they will be represented by a separate exclusive representative. Minn. Stat. § 179.67 (1982) (App. to Jur. St. A-91-A-95). An employee organization can be certified to exclusively represent a public employee bargaining unit by the director of the Bureau of Mediation Services (BMS), an independent state official, either by receiving a majority of the votes cast in a certification election involving employees in the unit or by voluntary recognition of the employer. *Id.* Certification by voluntary recognition requires a

joint request of the employer and the employee organization, a finding by the director of the BMS that no unfair labor practice was committed in submitting the request, and a determination that the organization represents over 50 percent of the employees in the bargaining unit. Minn. Stat. § 179.67, subd. 3 (1982) (App. to Jur. St. A-92).

The exclusive representative of a unit of professional employees has a duty to "meet and negotiate" the terms and conditions of employment on behalf of all employees in the bargaining unit. "Meet and negotiate" is a process whereby the public employer and the exclusive representative meet with the good faith intent of entering an agreement regarding the employees' terms and conditions of employment. Minn. Stat. § 179.63, subd. 16 (1982) (App. to Jur. St. A-89).

The exclusive representative may also "meet and confer" with the public employer on behalf of all employees in the unit. Minn. Stat. § 179.65, subd. 3 and Minn. Stat. § 179.73 (1982) (App. to Jur. St. A-90, A-95). Meet and confer means the formalized "exchange of views and concerns between [public] employers and their respective [professional] employees." Minn. Stat. § 179.63, subd. 15 (1982) (App. to Jur. St. A-89). The subjects of meet and confer are general policies and issues relating to the professional employees' employment which are outside the scope of the terms and conditions of employment. Minn. Stat. § 179.65, subd. 3 and § 179.66, subd. 3 (1982) (App. to Jur. St. A-90-A-91). In contrast to the negotiations process which is intended to lead to a formal collective bargaining agreement, no agreement is required concerning the matters discussed in the meet and confer process. Minn. Stat. § 179.66, subd. 1 (1982) (App. to Jur. St. A-90).

Teachers are professional employees under PELRA. Minn. Stat. § 179.63, subd. 10(c) (1982). For purposes of meet and

confer, professional employees' exclusive representatives are considered to be policy consultants whose "knowledge, expertise, and dedication . . . [are] helpful and necessary . . . and which may assist public employers in developing their policies." Minn. Stat. § 179.73, subd. 1 (1982) (App. to Jur. St. A-95).

If professional employees have selected an exclusive representative, the public employer may not meet and negotiate or meet and confer with any members of that bargaining unit except through their exclusive representative. Minn. Stat. § 179.66, subd. 7 (1982) (App. to Jur. St. A-91). By statute, this restriction does not "prevent communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is part of the employee's work assignment." *Id.*[1]

Even if professional public employees opt not to elect an exclusive representative to negotiate terms and conditions of employment, they may still meet and confer with their employer through a representative they select. Minn. Stat. § 179.-73, subd. 2 (1982) (App. to Jur. St. A-95). This representative is not the "exclusive representative" and cannot negotiate a collective bargaining agreement governing terms and conditions of employment. The meet and confer representative's jurisdiction is limited to the meet and confer process.

The plaintiffs stipulated and the district court found that the system of exclusive representation created in PELRA furthers numerous state interests. (Stipulation, J.A. A-37-A-39; Findings of Fact, App. to Jur. St. A-52-A-53). Included among these interests are: promotion of orderly and construc-

[1] This provision was added to PELRA in 1982. Minn. Laws 1982, ch. 568, § 2.

tive relationships between public employers and employees; avoidance of confusion, conflicting demands and dissension resulting from more than one representative per bargaining unit; maintenance of labor peace; and the creation of a procedure for the systematic expression of faculty views on a broad range of campus policy questions. *Id.*

D. Meet And Confer.

The MCCFA has negotiated four two-year employment contracts with the Board since the adoption of PELRA in 1971. (Findings of Fact, App. to Jur. St. A-46). As exclusive representative, the MCCFA has engaged the Board in meet and confer on behalf of all faculty in the bargaining unit. Originally, meet and confer sessions were held six times a year but in the 1980-81 academic year that number was reduced to the statutory minimum of three per year. Minn. Stat. § 179.73 (1982) (J.A. A-47). In accordance with provisions in the negotiated contracts, meet and confer takes place through a committee of no more than eight members selected by the MCCFA. (Findings of Fact, App. to Jur. St. A-47, A-96-A-98; Pl. Ex. 1, R. 92, 92). Subjects discussed at meet and confer meetings have included budgetary planning, new course proposals, curriculum, degree requirements, student activity budgets, academic standards, and teacher evaluation. (Findings of Fact, App. to Jur. St. A-48).

In addition to the statutorily-mandated meet and confer meetings with the Board, the faculty contract (Pl. Ex. 1, R. 92, 92) requires that meet and confer sessions also take place with each college's administration on a campus-by-campus basis.[2] (J.A. A-51-A-52). At each college, three to six com-

[2] These meet and confer sessions at the local level are referred to as "exchange of views."

mittees of members selected by the MCCFA meet regularly with the college administration. (J.A. A-52; App. to Jur. St. A-97; Pl. Ex. 1, R. 92, 92).

The MCCFA's practice has been to select representatives for the faculty meet and confer committees from its own membership and it has not permitted nonmembers of the MCCFA to serve on any meet and confer committees. (Findings of Fact, App. to Jur. St. A-50). The Board has no role in selecting the faculty's meet and confer representatives. (Findings of Fact, App. to Jur. St. A-50).

The Board is not required by PELRA to abide by the views expressed by the formal meet and confer committee or by individual faculty members. Regardless of the views expressed by the faculty committees or individual faculty members, final policy decisions on matters which are the subject of the meet and confer dialogue are reserved exclusively to the Board. Minn. Stat. § 179.66, subd. 1 (1982) (App. to Jur. St. A-90; J.A. A-53).

The view expressed by the faculty meet and confer committee on any particular subject is considered by the Board and by the administration to be the official position of the faculty on that subject. (J.A. A-50, A-56, A-97; Findings of Fact, App. to Jur. St. A-49). At the same time, it is also recognized that individual faculty members may hold views and positions other than those expressed by the committee. (J.A. A-50; Findings of Fact, App. to Jur. St. A-49).

Outside the formal meet and confer process, there exist multiple opportunities for faculty members to communicate their views to the Board and to community college administrations. (Findings of Fact, App. to Jur. St. A-50). There is no policy or practice that prevents faculty members from presenting their positions either in writing or otherwise to the Board, the chancellor, or any college president. (J.A. A-62-A-63).

Prior to each on-campus Board meeting, the Board makes itself available to persons on that campus who wish to express their views individually or in groups. (J.A. A-57, A-61-A-62). The MCCFA has never attempted to deny or abridge such communications. (J.A. A-64; Findings of Fact, App. to Jur. St. A-50). In addition, many faculty members have met with the chancellor to discuss whatever subjects they wish to discuss. (J.A. A-62-A-63).

On the college level, faculty members are not precluded from advising their administrators of their problems or views. (J.A. A-61-A-64, A-83-A-84, A-99-A-101). College presidents use a variety of means to solicit opinions from their faculties and students. (J.A. A-63-A-64; Findings of Fact, App. to Jur. St. A-50). One president holds all-college "town meetings" to obtain the views of faculty and students. (J.A. A-61). Another president makes himself available to faculty and students in the college commons area. (J.A. A-61). At one college's meet and confer sessions, any faculty member can appear as a "special witness" with the consent of the parties to meet and confer. (J.A. A-97-A-98, A-103). At the same college, the president hosts luncheons with randomly-selected groups, including faculty, where any person can address the president. (J.A. A-99-A-100). In addition, there are general faculty meetings and faculty breakfasts. (J.A. A-83, A-99-A-103). Each community college administrator who testified indicated that he maintained an open-door policy to receive faculty communications whether or not such communication came from members of the MCCFA. (J.A. A-61-A-63, A-84, A-99-A-101). Even some of the plaintiffs have expressed their views on various subjects of their choice to college administrators outside the meet and confer process. (J.A. A-61-A-63, A-124-A-126, A-130-A-131, A-184-A-185; R. 289).

In spite of the variety of avenues of communication available to all faculty members outside the meet and confer system, some of the plaintiffs find these alternatives unsatisfactory. A recurring reason for this dissatisfaction is that the alternatives are viewed as less "effective" or less "meaningful" than either meet and confer meetings or the faculty governance systems existing before the enactment of PELRA. (J.A. A-154-A-155, A-161; R. 1032; Findings of Fact, App. to Jur. St. A-51).

For some period of time after the first collective bargaining agreement was negotiated, there was confusion and apprehension in the community colleges concerning the intended effect of the meet and and confer process on faculty communication with administrators. (J.A. A-64-A-65, A-84, A-102). The process was new and untried. Some administrators were reluctant to informally communicate with faculty members for fear of violating the new contract or of committing an unfair labor practice under PELRA. (J.A. A-143, A-152-A-153, A-185-A-187; R. 289-290, 1012-1014). But after this initial period of uncertainty, the channels of communication outside meet and confer have been readily available to faculty members. (J.A. A-64-A-65, A-102).

E. District Court Ruling.

The three-judge district court panel (Judge Earl Larson dissenting) decided that Minn. Stat. § 179.66, subd. 7 and provisions of the collective bargaining agreement (App. to Jur. St. A-96-A-98) conferring on the MCCFA sole authority for selection of faculty meet and confer committee members are violative of the First and Fourteenth Amendments to the United States Constitution insofar as they deny the plaintiffs a fair opportunity to participate in the meet and confer pro-

cess. (Memorandum Opinion and Order, App. to Jur. St. A-31). The court determined that the present meet and confer system infringes First Amendment speech and associational rights of faculty who do not desire to join the MCCFA. (Memorandum Opinion and Order, App. to Jur. St. A-24).

Despite the finding that the meet and confer sessions were not general public forums, the court ruled that the right to participate in a "state compelled" faculty governance system is a fundamental right of college faculty members and the State's access restrictions were not supported by compelling, legitimate interests. (Memorandum Opinion and Order, App. to Jur. St. A-22, A-28-A-32). However, the court limited its ruling to public institutions of higher education because of what it perceived to be the importance of shared decisionmaking therein. (Memorandum Opinion and Order, App. to Jur. St. A-23 n.19, A-29).

To comply with the court's order of March 31, 1982, the Board and the MCCFA established a new selection process which permitted open nominations and a democratic election whereby each faculty member voted once for each vacancy on both the state and the local meet and confer committees. (Order, J.A. A-190). In proceedings after this appeal was filed, the plaintiffs also challenged this new selection process. In an order dated April 5, 1983, (Order, J.A. A-190), the district court concluded that the new procedure used to select the faculty's meet and confer representative was not consistent with its prior order. The court found that this procedure operated to totally exclude nonmembers of the MCCFA from membership on meet and confer committees. (Order, J.A. A-192). In order to counterbalance the numerical advantage of

MCCFA members, the district court ordered a cumulative voting process to

> ensure that nonunion faculty members will be able to elect at least one representative to each meet and confer committee if the committee size is retained at six, non-MCCFA faculty members constitute at least 17 percent of those present at the election, and they concentrate their votes behind a single candidate.

(Order, J.A. A-193). Under the court's order of April 5, 1983, non-MCCFA faculty members can concentrate all of their votes on one candidate. While this does not guarantee the plaintiffs a reqpresentative, the court ruled that the Constitution requires a voting procedure which affords a minority faction of the faculty a process which will ensure that it can potentially elect a representative despite its minority status. (Order, J.A. A-193).

SUMMARY OF ARGUMENT

The meet and confer process under the Minnesota Public Employment Labor Relations Act is a statutorily-established mutual exchange of views between a public employer and the professional employees' exclusive representative regarding non-negotiable educational and employment policy matters. Because it is primarily a private dialogue rather than a public forum for expression of faculty members' views, the meet and confer system is not required to be open to faculty members who do not wish to be represented therein by the exclusive representative.

The district court's decision that college faculty members have a First Amendment right to participate in the meet and confer process separate from the exclusive representative ignores this Court's position that the First Amendment does not require a public employer to negotiate with its employees or to listen or respond to employees' views. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979). Moreover, the district court's conclusion that college faculty members are to be accorded special First Amendment treatment on the basis of a purported tradition of faculty governance is supported neither by the case law nor the record.

Even if First Amendment interests of the faculty were implicated, limiting the meet and confer process to the faculty's exclusive representative is not violative of the First Amendment because it constitutes a reasonable access restriction to a nonpublic forum which is viewpoint neutral. *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S. Ct. 948 (1983). Meet and confer decisions are not public by tradition or designation. Access restrictions to such nonpublic forums are constitutionally permissible if

viewpoint-neutral and reasonable. Permitting only the exclusive representative access to the meet and confer process is based upon the viewpoint-neutral criterion of the status of the representative as the only organization selected by the faculty to represent all members of the bargaining unit.

The restrictive access is reasonable for several reasons. First, as exclusive representative of all community college faculty members, the MCCFA holds a special status which sets it apart from other groups of faculty members. In providing professional consultation to the Board, it is performing its official business. Second, this restrictive access promotes labor peace by an orderly exchange of views between the public employer and the faculty. Finally, the reasonableness of limiting meet and confer to the exclusive representative is further established by the fact that plaintiffs have access to numerous forums and alternative communication processes for expression of their views. They are free to present their views either individually or as a group. Outside of meet and confer, neither the Board nor the exclusive representative has attempted to restrict faculty members' access to any forum.

Even if the meet and confer process constituted a public forum, the state has sufficiently compelling reasons to justify restricting plaintiffs' participation in the meet and confer process. As in the negotiations process, it is essential that meet and confer be efficient, meaningful, orderly, systematic, and free from confusion and disruption. This Court has recognized that these reasons justify exclusive representation in public sector collective bargaining. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Plaintiffs' purported First and Fourteenth Amendment speech, association and equal protection interests are outweighed by the State's interests.

Even if the district court correctly concluded that the plaintiffs must be granted a fair opportunity to participate in the meet and confer process, plaintiffs have been accorded this opportunity. Under PELRA's process for selection of an exclusive representative, all faculty, including plaintiffs, have a voice. The exclusive representative was selected in a process that was open to and included the plaintiffs.

The cumulative voting procedure ordered by the district court to ensure that non-MCCFA faculty can elect a representative is not supported by the Constitution. The plaintiffs were given an opportunity to vote with all other faculty members for their meet and confer committee candidates and to serve in that capacity. That no plaintiffs were elected does not constitute a basis for compelled cumulative voting. Such a voting procedure amounts to mandatory proportional representation. This Court has rejected proportional representation requirements in an analogous situation. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

Finally, the district court abused its discretion in awarding plaintiffs 20 percent of their costs. The record reflects that less than six percent of the trial involved the meet and confer issue. While the determination of costs is not a mechanical matter, the court's departure from objective norms constitutes an abuse of discretion. Plaintiffs were wholly unsuccessful on their other claims which according to the district court were based on a "frivolous" theory and which "hindered rather than helped the court to resolve the issues raised in their complaint." The award of 20 percent of plaintiffs' costs is not proportionately related to the degree of plaintiffs' success herein and rewards their "wasteful attempt to obfuscate and circumvent" the settled law on the other issues they raised.

ARGUMENT

I. THE MEET AND CONFER STATUTES AND CONTRACT PROVISIONS ARE CONSISTENT WITH THE FIRST AMENDMENT.

A. The Meet And Confer Statutes And Contract Provisions Are Constitutional Because The Plaintiffs Do Not Have A First Amendment Right To Engage Their Public Employer In A Private Dialogue.

The fundamental nature of the meet and confer process established in PELRA and in the collective bargaining agreements between the Board and the MCCFA is that of a private dialogue between the public employer and professional consultant-employees. "'Meet and confer' means the exchange of views and concerns between employers and their respective [professional] employees." Minn. Stat. § 179.63, subd. 15 (1982) (App. to Jur. St. A-89). The opportunity to act as consultant to the public employer is accorded to Minnesota community college faculty by statute. Minn. Stat. § 179.73 (1982) (App. to Jur. St. A-95).

The district court erred in elevating the statutory right to meet and confer to a constitutionally-mandated right. There is no dispute that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). However, the district court expanded on this principle beyond its proper limits. Not every communicative activity that faculty members may wish to engage in is entitled to First Amendment protection. Specifically, the interaction provided for in the meet and confer process is not the type that has been or should be afforded protected status.

Indeed, this Court so held in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979) (per curiam). There, as here, the plaintiffs argued that a public employer was required by the First Amendment to be receptive to communications from them related to the employer-employee relationship. Specifically, a union and its members challenged a public employer's rule that required public employees to submit their grievances to the employer's representative directly rather than through their union. *Id.* at 464. The union claimed that its First Amendment rights were infringed because the employer would not recognize its communications concerning its members' grievances. This Court acknowledged that the First Amendment protects a public employee's right to "associate and speak freely and petition openly . . . ." *Id.* at 465. Nevertheless, the Court held, "the First Amendment does not impose any affirmative obligation on the government [employer] to listen, to respond or, . . . to recognize the association and bargain with it." *Id.* The Court concluded that "all that the [employer] has done in its challenged conduct is simply to ignore the union. That it is free to do." *Id.* at 466.

The conduct challenged here is simply the converse of that in *Smith* and is similarly valid. In *Smith*, the employer would recognize communication from individuals but not from the union; here, the employer will meet and confer with the exclusive representative but not with individuals. For constitutional purposes, this is a distinction without a difference. The character of the parties, the communication sought, and the First Amendment right asserted are similar. Just as the First Amendment did not require the employer "to listen, to respond or, . . . to recognize" the union in *Smith*, it does not compel

the Board to listen to, to respond to, or to recognize the plaintiffs in the meet and confer process here.[3] *Id.*

The meet and confer process is not a public forum for general expression of faculty viewpoints. Relying on this Court's decision in *City of Madison, Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), the district court properly concluded that the plaintiffs have no absolute free speech right of access thereto. (Memorandum Opinion and Order, App. to Jur. St. A-22 n. 18). Meet and confer does not involve the kinds of faculty expression and association that have been recognized as First Amendment freedoms. Accordingly, the district court also correctly distinguished the decisions of this Court which addressed teachers' First Amendment freedoms of expression and association. *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967) (statutes and regulations which disqualified from employment public school teachers and state employees who advocated or belonged to organizations that supported the violent overthrow of the government ruled unconstitutional); *Shelton v. Tucker*, 364 U.S. 479 (1960) (state law requiring teachers to file affidavits listing names of associations to which they belonged or contributed ruled unconstitutional); and *Sweezy v. State of New Hampshire*, 354 U.S. 234 (1957) (right of a state attorney general acting under the aegis of the state legislature to question teachers about their lectures and knowl-

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[3] The district court found that the plaintiffs' inability to participate in the meet and confer process violated their associational interests as well as their speech interests. As explained herein, participation in meet and confer is not protected by the First Amendment. Since there is no fundamental right to engage a public employer in a private dialogue, plaintiffs' associational interests are not infringed by limiting meet and confer to the exclusive representative.

edge of certain subjects restricted). (Memorandum Opinion and Order, App. to Jur. St. A-21).

The meet and confer provisions of section 179.66, subd. 7 and the faculty contract provisions recognizing the MCCFA's authority to select its faculty meet and confer representatives (App. to Jur. St. A-97) do not abridge expression that is constitutionally protected. The free expression of views is not restricted by the meet and confer process. Faculty members' academic freedom is secure. They may speak to and associate with whomever they wish. There is no evidence of any restrictions on plaintiffs' classroom activities or teaching methods. The only act they cannot do is formally meet and confer with their employer.

Nevertheless, the district court found that inasmuch as PELRA's meet and confer process is a compelled system for resolution of issues outside the scope of collective bargaining, participation therein is a fundamental First Amendment right of public college faculty members. (Memorandum Opinion and Order, App. to Jur. St. A-23). The district court's concern for protecting the faculty's role in educational policy decisionmaking at the college level is its primary justification for finding that participation in meet and confer is a fundamental right. (Memorandum Opinion and Order, App. to Jur. St. A-18-A-23). However, there is no authority to suggest that faculty participation in college governance is any more deserving of First Amendment protection than is the right to engage in collective bargaining. To the contrary, in *Gonzalez v. Irizarry*, 387 F. Supp. 942 (D. P. R. 1974), the court rejected college faculty members' claim of First Amendment protection of their participation in a statutory faculty senate system. The court found no basis for equating the right to vote for members of the Academic Senate with the right to political freedom and

association. *Id.* at 946. *Accord Johnson v. Board of Regents of the University of Wisconsin*, 377 F. Supp. 227 (W.D. Wisc. 1974) (college faculty are not constitutionally entitled to participate in deciding which faculty members will be terminated or laid off).

Moreover, the Minnesota district court's emphasis on the overriding importance of faculty participation in college governance was misplaced. It viewed this process as one of "shared decisionmaking" and relied upon four monographs as examples of literature in the field which support its existence and importance. (Memorandum Opinion and Order, App. to Jur. St. A-18). The court thus found "a longstanding tradition of a faculty participation in college governance" and determined that college faculty members should be involved in decisionmaking. (Memorandum Opinion and Order, App. to Jur. St. A-18).

However, the tradition of shared decisionmaking on which the court strongly relied is viewed by some authorities as more "an ideal that a widely adopted practice." K. Mortimer & T. McConnell, *Sharing Authority Effectively* 4 (1978). The popular concept of academic governance as expressed by the district court more accurately reflects what some feel "*ought* to be rather than what actually *is*." *Id.* at 5 (emphasis in original).

Furthermore, the court made no distinctions among faculty governance at the two-year community colleges, technical schools, four-year liberal arts colleges, and state universities with undergraduate, graduate, and professional schools. The district court erroneously assumed that shared decisionmaking was homogeneous in fact and existed at all levels of higher education and at all institutions. But faculty involvement in community college governance is not generally comparable

to that in other types of educational institutions.[4] The governance tradition in a two-year community or junior college system emerging from local school district control to statewide systems is different from that of four-year colleges and universities both emerging and mature. American Association for Higher Education—National Education Association, *Faculty Participation in Academic Governance*, 10-11, 31-32 (1967).

Moreover, the evidence in this case does not fit the district court's view of faculty governance. There was no distinct pattern of faculty governance in the community colleges. (J.A. A-45 - A-46, A-67 - A-68, A-112, A-114 - A-120, A-123 - A-124, A-157 - A-158). The district court's reliance on a tradition of shared decisionmaking in the community colleges is misplaced.

Finally, sound public policy does not justify expanding the scope of the First Amendment to include the kind of dialogue included in the meet and confer process.

Inherent in the definition of meet and confer is the mutual obligation of the public employer and the exclusive representative to engage in a dialogue. The parties are expected to listen and respond in a meaningful fashion to one another's views on educational and college policy matters. However, the subject matter of meet and confer is those matters reserved to management decisionmaking and the views of the faculty representatives need not be heeded by the employer. *Minneapolis*

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[4] For example, the limited decisionmaking authority of community college faculty in this case is in sharp contrast to the situation at institutions such as Yeshiva University which have absolute authority in academic matters. At Yeshiva the faculty decides what courses are offered, when they will be offered, sets admission standards, grading policies and matriculation requirements, and in essence makes management decisions. National Labor Relations Board v. Yeshiva University, 444 U.S. 672, 687 (1980).

Federation of Teachers v. Minneapolis Special School District, 258 N.W.2d 802 (Minn. 1977). The State of Minnesota has determined that it is in its best interest in formulating its policy decisions to avail itself of the expertise of its professional employees in the role of consultants. Minn. Stat. § 179.73 (1982) (App. to Jur. St. A-95). For this limited but important function, the State has decided to restrict its public employers to meeting and conferring with only the exclusive representative of professional employees or, if one has not been certified, with the employees' meet and confer representative. Minn. Stat. § 179.66, subd. 7 (1982) (App. to Jur. St. A-91).

To require that each faculty member has a constitutional right to meet and confer either directly or through a representative with the public employer would result in a burdensome intrusion into the policymaking function of higher education governing boards such as the Minnesota State Board for Community Colleges. It may be enlightened labor policy to consult with professional employees, but it would pose a serious threat to the efficient administration of the community colleges if the Board were constitutionally mandated to meet and confer with representatives of each faculty group.

Accordingly, the First Amendment does not obligate the Board to consult with or listen to any person or group including its faculty members. The district court's contrary ruling mandates that the faculty be involved in policy decisions as a matter of constitutional right. This decision is contrary to this Court's decision in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979), is contrary to the facts, and is an unwarranted intrusion into the administration of the community college system. For these reasons the decision below should be reversed.

B. Even If The Meet And Confer Process Implicated First Amendment Interests, That Process Created Merely A Nonpublic Forum Which Is Reasonably Limited In Light Of The Purposes It Serves.

Even if the meet and confer process did involve activity entitled to some protection under the First Amendment, this Court's recent decision, *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S.Ct. 948 (1983), compels the conclusion that the district court's decision should be reversed. In *Perry*, this Court upheld restrictions imposed on access to a forum for communication in an educational institution because: a) the forum was not open to the public either by tradition or designation; and b) the restriction on access was reasonably based on the parties' status rather than viewpoint. These same conditions are present here and require a similar conclusion.

1. Meet And Confer Sessions Are Not Public Either By Tradition Or By Designation.

In *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S. Ct. 948 (1983), this Court ruled that the First Amendment was not violated when a union that had been selected by public school teachers as their exclusive bargaining representative was granted access to the school district's interschool mail system while such access was denied to a rival union. A critical factor in the Court's analysis of the rival union's claim was the "character" of the use of the interschool mail system. *Id.* at. —, 103 S. Ct. at 954. If the public property was used, either by tradition or by designation, "as a place for expressive activity," a public forum was created. *Id.* at ——, 103 S. Ct. at 954-55. If, however, the pub-

lic property was reserved "for its intended purposes, communicative or otherwise," it was a nonpublic forum. *Id.* at ——, 103 S. Ct. at 955. The Court concluded in *Perry* that the school district's mail facilities were reserved for their intended purposes. *Id.* As a result, the school district could reasonably restrict access to them consistent with their intended purpose as long as the restrictions were not intended to suppress expression based upon the speaker's view. *Id.* at ——, 103 S. Ct. at 955, 957-58.

The district court in this action correctly concluded that the meet and confer process was not a public forum. (Memorandum Opinion and Order, App. to Jur. St. A-22). The same analysis used by this Court in *Perry* confirms that meet and confer sessions are not public by tradition or by designation. The meet and confer process is restricted to the public employer and either the exclusive representative, Minn. Stat. § 179.66, subd. 7 (1982) (App. to Jur. St. A-91), or the duly-selected meet and confer representative. Minn. Stat. § 179.73, subd. 2 (1982) (App. to Jur. St. A-95). Accordingly, these statutes have not created a public forum by designation. Furthermore, inasmuch as these statutory restrictions have applied consistently from the creation of the meet and confer process in 1971, Minn. Laws 1971, Ex. Sess., ch. 33, §§ 6 and 13, that process certainly is not a public forum by tradition.

The district court, however, determined that PELRA is the codification of the former faculty senate tradition together with the tradition of faculty participation in college governance. (Memorandum Opinion and Order, App. to Jur. St. A-18 - A-23). Although the court conceded that the meet and confer system was not a public forum, it believed the system was an important academic forum to which the plaintiffs have a First Amendment right of equal access. (Memorandum Opinion and Order, App. to Jur. St. A-22 - A-24).

The court erred in treating meet and confer as a forum to which plaintiffs have a right of equal access. First, the record does not support a finding of a faculty senate tradition in the Minnesota community colleges. Three community colleges had a formal faculty senate. (J.A. A-109 - A-110, A-114, A-157 - A-158). The only other evidence in the record of faculty involvement in college governance was a general description that it varied widely from considerable to very little involvement. (J.A. A-46). Therefore, the district court's reliance on "the faculty senate system which predated PELRA" and for which "all faculty members formerly had the right to vote for individual representatives" (App. to Jur. St. A-27, A-28) is simply unsupported by the record.

The second flaw in the district court's reasoning is that nothing in the record indicates that the legislature adopted the meet and confer provisions to codify a faculty senate system. Indeed, that meet and confer applies to all professional employees, not just college teachers, indicates that the meet and confer process did not merely codify the faculty governance system.

Moreover, the two systems, if there was a faculty senate system, are separate and distinct. Faculty senates operated locally while the statutory meet and confer process requires a dialogue at only the state level. Community college faculty senates were principally faculty groups involved in formulating faculty positions on college matters while meet and confer is a system for organized dialogue between the Board and college administration and the faculty through its exclusive representative. Also, at least two community college presidents participated in faculty senate deliberations and had voting rights (J.A. A-95, A-119). By contrast, in meet and confer there is no evidence of any participation by college administra-

tors in the formulation of faculty positions. In short, the district court's treatment of meet and confer as the codification of the faculty senate system is not supported by the evidence or by the language of PELRA.

Moreover, the meet and confer process does not contravene plaintiffs' First Amendment rights even if they have a lesser participatory role than existed under a prior faculty senate system. The "state is not required to indefinitely retain the open character" of forums. *Perry*, —— U.S. at ——, 103 S. Ct. at 955. Indeed, this Court in *Perry* rejected the contention that the plaintiff union's prior unrestricted access to the mail system mandated that accessibility to the forum be "judged by the constitutional standard applicable to public forums." *Id.* at ——, 103 S. Ct. at 956. Similarly, neither the state legislature nor the Board is obliged to make available to college faculty all attributes of previously existing forums.

In sum, using this Court's forum analysis, meet and confer is a forum reserved for its intended limited purpose of providing for an exchange of views between the public employer and its professional employees' exclusive representative. It has never been open to members of the public nor has it ever been open to each faculty member.

2. Restricting the Meet and Confer Process to the Exclusive Representative is Reasonable Because the Restriction is Viewpoint-Neutral and Because of the Exclusive Representative's Special Status.

If, as established in the preceding section, access to the government forum is limited to its intended purpose, such limitations are permissible if reasonable and not directed toward

suppressing a particular speaker's view. *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S. Ct. 948, 957 (1983); *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 131 (1981) (limitations on a civic organization's use of mail boxes upheld). Limiting access to the exclusive representative MCCFA meets this test.

a. The Meet and Confer Process is Reasonable Because it is Viewpoint-Neutral.

Even if a public forum is limited to a particular purpose, the limitations cannot be used to suppress the expression of a person's views. *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 131 n.7 (1981). Restricting meet and confer to the exclusive representative was a general legislative determination made before anyone knew which organizations would be certified as exclusive representatives. Therefore, the meet and confer process under PELRA clearly was not intended to discriminate against speakers on the basis of their viewpoints.

Moreover, in *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S. Ct. 948 (1983), this Court recognized that restrictions applicable to a rival union's access to an interschool mail system did not constitute viewpoint discrimination. *Id.* at ——, 103 S. Ct. at 957. The Court noted the absence of any "indication that the school board intended to discourage one viewpoint and advance another," and observed that "the access policy [w]as based on the *status* of the respective unions rather than their views." *Id.* (emphasis in original).

As in *Perry*, the meet and confer access policy is based on the status of the MCCFA as exclusive representative, not its viewpoints. This access is accorded any exclusive representative of professional public employees, regardless of its views. Minn. Stat. § 179.66, subd. 7 (1982) (App. to Jur. St. A-91). The status rather than the views of the organization is the determinative criterion. Such a criterion is viewpoint-neutral.

b. Restricting Access to the Meet and Confer Process to the Exclusive Representative is Reasonable Because the MCCFA Holds a Special Status.

Restricting meet and confer to the exclusive representative is reasonable for several reasons. First, the exclusive representative holds a special status under Minnesota's PELRA. Under PELRA, the exclusive representative is required to represent all employees in the bargaining unit. Minn. Stat. § 179.67, subds. 3 and 12 (1982) (App. to Jur. St. A-92, A-94). This responsibility includes not only negotiating and administering a labor contract for all employees in the bargaining unit but also meeting and conferring on their behalf. This Court has already recognized the serious responsibilities imposed on the exclusive representative in representing public employees in the bargaining unit. *Abood v. Detroit Board of Education*, 431 U.S. 209, 221 (1977).

Moreover, this Court has expressly recognized that these "special responsibilities" justify according the exclusive representative sole access to a nonpublic forum. *Perry*, —— U.S. at ——, 103 S. Ct. at 958-59. This Court in *Perry* noted that a public employer reasonably may permit only the exclusive representative access to a nonpublic forum if that access relates to "the forum's official business." *Id.* at ——, 103 S. Ct.

at 959 (footnote omitted). The "official business" of the forum was implicated in *Perry* because exclusive use of the school mail facilities by the exclusive representative permitted it "to perform its obligations as exclusive representative of *all* Perry Township teachers." *Id.* at ——, 103 S. Ct. at 958 (emphasis in original; footnote omitted). Exclusively meeting and conferring with the public employer is itself an official duty of the MCCFA. The Board's official function is to make policy and the MCCFA's function as exclusive representative is to be a professional policy consultant to the Board.

A second reason limiting access to the meet and confer process to the MCCFA is reasonable is that such restrictive access promotes labor peace by establishing "orderly and constructive relationships between all public employers and their employees" which is a goal of PELRA. Minn. Stat. § 179.-61 (1982) (App. to Jur. St. A-87). In meeting and conferring with the representative of all employees in the bargaining unit, the public employer is guaranteed a professional consultant in representing the collective wisdom of a majority of the community college faculty. Moreover, it would seriously impair the Board's function if it were constitutionally required to meet and confer with representatives of each subgroup of its faculty who espoused views of a policy issue different from that presented by the MCCFA. "There must be a limit to individual argument in such matters if government is to go on." *Bi-Metallic Investment Company v. State Board of Equalization*, 239 U.S. 441, 445 (1915). The plaintiffs are just one example of the various and changing interest groups which could demand access to the Board through the meet and confer process if the district court's decision is upheld. The present system prevents meet and confer from deteriorating into a forum for wrangling between rival employee groups. Un-

limited access to the meet and confer process could disrupt its function as an effective dialogue by creating a cacophony of professional views.[5]

"Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of . . . speaker identity." *Perry*, —— U.S. at ——, 103 S. Ct. at 957. The exclusive representative was selected by the members of the bargaining unit to be the exclusive agent to act in their behalf regarding matters relating not only to the terms and conditions of employment but also relating to educational and employment policies outside of the terms and conditions of employment. Minn. Stat. § 179.65 (1982) (App. to Jur. St. A-89). Accordingly, an orderly employment relationship and labor peace are furthered by limiting the meet and confer dialogue to the employer and exclusive representative.

Finally, the reasonableness of the limitations on access to the meet and confer process is supported by the substantial alternative channels that remain open for professional employee-employer communication. The reasonableness of access limitations is supported by "substantial alternative channels that remain open for . . . communication to take place." *Perry*, —— U.S. at ——, 103 S. Ct. at 959.

The plaintiffs have ample opportunities outside of meet and confer to communicate their views to the Board and the administration. The record is devoid of any instance where the Board had refused to hear any faculty member on any subject. The chancellor and the two college presidents who testified agreed that they are receptive to expressions of faculty mem-

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[5] The plaintiffs have never claimed to represent the interests of all non-MCCFA faculty members in the community college system. This was not a class action. The potential for myriad other factions to demand direct access to the meet and confer process is obvious.

bers' views regardless of their relationship to the MCCFA. (J.A. A-61 - A-63, A-83 - A-84, A-99 - A-101). College presidents and the Board have even attempted to encourage expressions of faculty views by making themselves conspicuously available on campus (J.A. A-57 - A-61), by sponsoring faculty breakfasts, luncheons, and all-college "town meetings" (J.A. A-61 - A-62, A-64, A-83 - A-84, A-99 - A-101), and by maintaining an open-door policy for faculty communications (J.A. A-61 - A-63, A-83 - A-84, A-99 - A-101). The plaintiffs who testified at the trial confirmed that these forums are available to them and that they have utilized some of them to communicate their views. (J.A. A-124 - A-126, A-130, A-185; R. 289, 433-4). The MCCFA has never attempted to interfere with faculty members' access to these forums. In this regard the district court found:

> The right of all faculty, both members and nonmembers of MCCFA, to communicate informally and individually with administrative officials has not been impaired by the MCCFA, MEA, NEA or the MSBCC.

(Findings of Fact, App. to Jur. St. A-52). The record and the district court's Findings of Fact conclusively dispel any concern regarding the plaintiffs' alternative modes of communication.[6]

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[6] There is no showing here that plaintiffs' ability to communicate with their employer is "seriously impinged by the restricted access" to the meet and confer system. Perry Education Association v. Perry Local Educators' Association, —— U.S. ——, 103 S. Ct. 948, 959 (1983).

C. The Meet And Confer Process Serves A Compelling Interest And Is Narrowly Drawn To Achieve That End.

Even if the meet and confer process constituted a public forum, the exclusive meet and confer process nevertheless is constitutional because it serves compelling state interests and the restrictions on access are narrowly tailored to serve those interests. The plaintiffs have stipulated to the State's interests and the district court has correspondingly adopted them. (Findings of Fact, App. to Jur. St. A-52 - A-53; J.A. A-37). Nevertheless, the district court refused to concede that the interests identified in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which support an agency shop are sufficiently compelling to support Minnesota's meet and confer system. (Memorandum Opinion and Order, App. to Jur. St. A-27).

This Court has determined that a state has sufficiently compelling interests to support a collective bargaining structure for public employees which utilizes an exclusive representative. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Many of the same state interests involved in *Abood* are involved in this case. The governmental interest in meeting and conferring with a single employee representative is similar to its interest in negotiating an employment contract with a single employee representative. As in *Abood*, the State is interested in eliminating confusion and creating a procedure for systematic expressions of faculty responses to policy matters. *Id.* at 220. The principle of exclusive representation serves the same purposes in both instances: the promotion of labor peace and stability through the construction of orderly relationships between employer and employee representative.

Moreover, the meet and confer process as presently structured improves the community college system. Education is one of the most important services performed by the state.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). The meet and confer process makes available an educational "policy consultant" to assist the Board in developing important educational and administrative policies. It provides the Board with resources and expertise in its deliberations on the essential matter of public education.

Nevertheless, the district court has required the Board to fashion a meet and confer representative selection process which undermines the ability of the meet and confer system to further these compelling state interests. Under the district court's scheme, it must be possible for the plaintiffs to elect their own representative to the faculty's meet and confer committee. (Order, J.A. A-193). Presumably, the district court would rule similarly on behalf of any other group of faculty members who claim to have views on any meet and confer issue other than the viewpoints represented by the meet and confer committee. Such a result underscores the State's interest in meeting and conferring with just the exclusive representative. Otherwise, size and membership of the faculty's meet and confer committee must be constantly monitored by the Board to ensure access by representatives of any special-interest faculty subgroup. To permit access to each subgroup would defeat the ability of the Board to obtain a benefit from the process. Meaningful input would be lost in the din of competing viewpoints.

The effect of the district court's decision potentially eviscerates the benefits reaped by the State in meeting and conferring with the faculty's exclusive representative. The State's incentive for continued involvement of faculty in educational policymaking may reasonably ebb if the responsibilities imposed upon it by the district court result in an ineffective array of faculty viewpoints limited only by the number of groups who demand to be involved in meet and confer consultations.

The meet and confer process is narrowly tailored to serve the State's compelling interest of fostering an orderly and meaningful exchange of views process with its professional employees.

II. IF THE PLAINTIFFS HAVE A FIRST AMENDMENT INTEREST IN THE SELECTION OF THEIR MEET AND CONFER REPRESENTATIVE, THAT INTEREST HAS NOT BEEN ABRIDGED AND THE CUMULATIVE VOTING REQUIREMENT IS IMPROPER BECAUSE THE PLAINTIFFS HAVE A VOICE IN THE SELECTION OF THEIR EXCLUSIVE REPRESENTATIVE.

The district court held that the First Amendment requires a "fair opportunity to participate in the selection of governance representatives." (Memorandum Opinion and Order, App. to Jur. St. A-23). It was undisputed that plaintiffs had an opportunity to participate in the selection of their exclusive representative. However, the court's conclusion that plaintiffs were not accorded a fair opportunity to participate in the selection of their meet and confer representative under either the original selection procedure or the procedure adopted to implement the court's order of March 31, 1982, is unfounded.[7]

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[7] The district court correctly decided that, because of the State's interest in maintaining an orderly process, the plaintiffs are not entitled to meet and confer individually with the Board. (Memorandum Opinion and Order, App. to Jur. St. A-22). The requirement of indirect representational participation was thus upheld. *Id.*

A. The Procedure For Selection Of An Exclusive Representative Under PELRA Provides Plaintiffs With A Fair Opportunity To Select Their Meet And Confer Representative.

PELRA provides all employees in a bargaining unit with a voice in the selection or removal of their exclusive representative. Minn. Stat. § 179.67 (1982) (App. to Jur. St. A-91). An employee organization is certified as the exclusive representative of the bargaining unit after receiving a majority of the votes cast in a certification election. Minn. Stat. § 179.67, subd. 7 (1982) (App. to Jur. St. A-93).[8] Ballots in certification elections include an option to vote for "no representation." Minn. Stat. § 179.67, subd. 9 (1982) (App. to Jur. St. A-94). Additionally, PELRA provides a procedure for the decertification of an exclusive representative and a new election where it is shown that the exclusive representative has lost the support of the majority of those in the unit. Minn. Stat. § 179.67, subds. 4 and 5 (1982) (App. to Jur. St. A-92 - A-93).

This procedure is available to the plaintiffs for the selection of their representative for collective bargaining and meeting and conferring. Every faculty member in the bargaining unit may vote in the election. Neither associational affiliations nor personal viewpoints can be or are used to disqualify any faculty member's involvement in the selection of their exclusive representative. PELRA provides a system that is open to all

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[8] Where the employee organization is certified as the exclusive representative upon the joint request of the organization and the employer, it is still required that the organization prove that it has obtained the support of more than 50 percent of the employees in the unit. Minn. Stat. § 179.67, subd. 3 (1982) (App. to Jur. St. A-92).

members of the bargaining unit without restriction. It is democratic, reasonable and fully consistent with the district court's mandate of a fair opportunity to participate.

The district court incorrectly rejected this reasoning because in the prior faculty senates all faculty members could vote for their faculty governance representatives and serve in that capacity and because the MCCFA can exclude from committee membership individuals whose views are inconsistent with those of the Association. (Memorandum Opinion and Order, App. to Jur. St. A-27 - A-28).

These reasons are inapposite. First, as discussed above, the meet and confer system is not the same as a faculty senate. *See* Section I.B.1., *supra*. The meet and confer process is an integral part of the formal relationship between the Board as a public employer and the faculty's duly-selected exclusive representative. Second, the plaintiffs do have the right to vote for their meet and confer representative when they elect their exclusive representative. Third, even if the plaintiffs had opportunities prior to PELRA that they do not have now, there is no constitutional violation. *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S. Ct. 948, 956 (1983).

Additionally, the record does not contain evidence of any retaliation either actual or threatened against plaintiffs for the exercise of their First Amendment rights. The Board and its administrators treat all faculty without regard to their affiliational status. Similarly, there is no evidence in the record of any retaliation by the MCCFA or that the MCCFA used its access to the meet and confer process to impose "ideological conformity or otherwise impair the free expression of employees." *Abood v. Detroit Board of Education*, 431 U.S. 209, 219 (1977) (citing *Railway Employees' Department v. Han-*

son, 351 U.S. 225 (1956)). Indeed, the district court so held. (Findings of Fact, App. to Jur. St. A-52).

Thus, plaintiffs are entitled to participate in the selection of the meet and confer representative and have been afforded a fair opportunity to participate in the meet and confer process.

B. The Amended Procedure For Selection Of The Faculty's Meet And Confer Representative Fully Comports With The Court's Order Of March 31, 1982, And The Supplemental Order Requiring Cumulative Voting Lacks A First Amendment Foundation.

In compliance with the district court's order of March 31, 1982, the procedure for selection of the faculty's state and local meet and confer committees was revised. The new procedure allowed any willing faculty member to run for a position on one of the six-member committees and it also provided for a democratic election. (Order, J.A. A-191). All faculty in the bargaining unit were eligible to vote. To ensure that all six vacancies were filled, each voter was required to vote once for each vacancy on the committee. *Id.* In the first election under this procedure no non-MCCFA member was elected to a committee. *Id.*

The district court found that this new election procedure contravened its order of March 31, 1982:

> As long as MCCFA members continue to constitute a majority of the faculty persons voting and they vote for the union-endorsed slate, no non-MCCFA member can ever be elected.

Id. at A-191. To remedy this perceived deprivation of plaintiffs' First Amendment right to participate in the meet and

confer process, the court ordered that a cumulative voting system be implemented. *Id.* at A-192. Under this system,

> each elector will have a number of votes equal to the number of committee members to be chosen and will be permitted to concentrate his or her votes on one candidate, or to distribute them as he or she sees fit.

Id. at A-193. This system was ordered so that non-MCCFA faculty members will be able to elect at least one representative

> if the committee size is retained at six, non-MCCFA faculty members constitute 17 percent of those present at the election, and they concentrate their votes behind a single candidate.

Id. at A-193. The district court did not cite any authority for this decision.

If plaintiffs are entitled to vote for a separate meet and confer representative, they were accorded that right in the revised meet and confer selection procedure. The revised procedure involved a fully democratic election in which each faculty member could participate. The MCCFA's prior right to select committee members from its own ranks was eliminated. Each faculty member was eligible to vote for committee representatives and to serve in that capacity. This process fairly operated to set each faculty member on a par with every other individual faculty member. (Order, J.A. A-190). The revised election process was fully consistent with the district court's original requirement that each faculty member have a "fair opportunity to participate." (Memorandum and Order, App. to Jur. St. A-23). Nevertheless, the district court rejected the adequacy of this system and ordered a cumulative voting election system.

The court-ordered cumulative voting procedure erroneously results in the imposition of a constitutional mandate of proportional representation on meet and confer committees. There is no precedent for this decision. Moreover, this Court has rejected the argument that minority interests are constitutionally entitled to proportional representation in single- or multi-member legislative districts where the supporters of a losing candidate had no legislative seat assigned to them. *Whitcomb v. Chavis*, 403 U.S. 124, 157 (1971). In *Whitcomb*, a multi-member legislative districting arrangement was challenged as being discriminatory against certain racial minority factions primarily because it cancelled the voting power of a particular significant racial minority. *Id.* at 145. In its rejection of this challenge, this Court noted that the same claim could be propounded by any of several minority groups that are unable to elect a representative because of their minority status. *Id.* at 157.

> At the very least, affirmance of the District Court would spawn endless litigation concerning the multi-member district system now widely employed in this country.

Id. at 158 (footnote omitted).

This Court's rationale in *Whitcomb* compels rejection of the district court's cumulative voting requirement here. Cumulative voting was ordered below to ensure that a minority faculty group would be capable of electing a committee representative. The only factor preventing plaintiffs from electing a representative under the prior election system was that their candidates did not receive sufficient votes. (Order, J.A. A-191). This did not constitute a violation of the minority group's constitutional rights in *Whitcomb* and it does not violate the plaintiffs' constitutional rights in this case.

The cumulative voting requirement imposes a substantial and continuing burden on the Board to provide a meet and confer system that is accessible to the plaintiffs and presumably every other group of faculty members who are unrepresented on the meet and confer committee. While the district court apparently viewed the faculty as consisting of only two groups, there is nothing in the record to indicate that the community college faculty are clearly divisible along MCCFA and non-MCCFA lines. Faculty may coalesce into formal or informal interest groups which are unrelated to a union animus. A cumulative voting requirement opens the meet and confer system to every other interested faculty group despite its minority status. This result imposes on the Board an unreasonable burden which may not be met without sacrificing the intended benefits of the meet and confer process.

All community college faculty members had an opportunity to participate on an equal basis in the democratic election process which was enacted to comply with the district court's order of March 31, 1982. The subsequent cumulative voting requirement lacks a constitutional foundation and is inconsistent with the State's interest in an orderly and useful meet and confer arrangement.

III. THE DISTRICT COURT'S AWARD OF 20 PERCENT OF COSTS TO PLAINTIFFS CONSTITUTES AN ABUSE OF DISCRETION BECAUSE IT DOES NOT REFLECT A CAREFUL SCRUTINY OF THE COSTS NOR IS IT REASONABLE IN LIGHT OF THE PLAINTIFFS' LEVEL OF SUCCESS.

The MCCFA has correctly challenged the district court's award of costs to the plaintiffs as an abuse of discretion. (Jur. Stmt. of Labor Org. at 17). The court awarded plaintiffs 20 percent of their costs even though it was virtually uncontested

that the meet and confer issue upon which plaintiffs prevailed was addressed by none of the plaintiffs' expert witnesses and in only three percent of plaintiffs' exhibits, six percent of the trial transcripts, .004 percent of the plaintiffs' proposed stipulations. (Order, App. to Jur. St. A-2). The court's award arbitrarily allocated an amount which far exceeded the percentage of time and costs expended on the prevailing issue without sufficient justification. In fact, the court's sole reason for the disproportionate award was the "overlap between the First Amendment claim as to meet and confer practices and the other practices challenged by the plaintiffs." *Id.*

With regard to the issues which the court found to overlap with the question on which plaintiffs prevailed, the district court found that this protracted litigation (41 hearing days, 6,000 pages of transcript, and over 500 exhibits) largely resulted from the plaintiffs' refusal to acknowledge the impact of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). (Order, App. to Jur. St. A-3). The district court further found that the plaintiffs' elaborately-developed theory concerning issues other than meet and confer was "frivolous" and could have been presented "in a cogent manner as a legal question turning on largely undisputed facts." *Id.* at A-4. The district court went on to find that "indeed, the presentation of plaintiffs' case has hindered rather than helped the court resolve the issues raised in their complaint." *Id.* Similarly, the court found that "much of the present litigation has been a wasteful attempt to obfuscate and circumvent that clear holding [of *Abood*]" *Id.* at A-5, n. 2.

The authority to tax costs under Fed. R. Civ. P. 54(d) does not give district judges unrestrained discretion. *Farmer v. Arabian American Oil Company*, 379 U.S. 227 (1964). In *Farmer*, this Court noted that district judges should sparingly exercise their discretion in taxing costs not specifically al-

lowed by statute. A careful scrutiny of costs is needed, the Court stated, in order to reduce the high cost of litigation. This interpretation of Rule 54(d) is consistent with Rule 1 which requires that rules be interpreted so as to lead to a just, speedy and inexpensive determination of the action. Fed. R. Civ. P. 1. The district court's rationale of overlapping First Amendment issues to justify its award of costs is not consistent with the careful scrutiny standard established by this Court.

In a recent case concerning an award of attorney's fees under 42 U.S.C. § 1988, this Court held that the extent of an attorney's success is a crucial factor in determining the proper amount of fees. *Hensley v. Eckerhart*, —— U.S. ——, 52 U.S.L.W. 4551 (decided April 16, 1983). Specifically, *Hensley* concerned the provision in section 1988 which authorizes the trial court to exercise its discretion in granting attorney's fees as part of the costs authorized by Rule 54(d). In that case, the discretion granted to the lower court was tempered by this Court's ruling that consideration be given to the relationship between the extent of success of the prevailing party and the amount of the award. The lower court was required to consider what amount was reasonable in light of the level of success. *Accord Globe Life and Accident Insurance Company v. Still*, 402 F.2d 295 (5th Cir. 1968) (award of more than one-third of the costs to an appellant who had only obtained one-third of the judgment was an abuse of discretion).

In the present case, an award of 20 percent of costs to plaintiffs who prevailed on an issue that took a maximum of six percent of the trial time is a similarly disproportionate award. It far exceeds the percentage of time and costs expended on the prevailing issue. In essence, the award requires the Board and the MCCFA to subsidize the plaintiffs' unsuccessful and wasteful efforts to have the collective bargaining portion of

PELRA declared unconstitutional. The plaintiffs' protracted efforts on other than meet and confer issues were the principal subject of the trial and pre-trial proceedings. As the district court recognized, the plaintiffs unnecessarily prolonged these proceedings. The award of costs thereby serves to reward plaintiffs for their delaying tactics. As a result, the award of 20 percent of costs is not reasonable in light of the plaintiffs' level of success and should be set aside.

CONCLUSION

For the reasons stated, the decision of the district court finding that the meet and confer statutory and contract provisions are unconstitutional should be reversed and the award of costs should be set aside.

Dated: June, 1983.

Respectfully submitted,

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No. 82-898

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES, *et al.*,

Appellants,

v.

LEON W. KNIGHT, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Minnesota

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BRIEF FOR THE APPELLEES

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QUESTION PRESENTED

As applied in the Minnesota community-colleges, is that State's Public Employment Labor Relations Act unconstitutional under the First and Fourteenth Amendments to the United States Constitution in so far as it denies nonmembers of the college-faculty's exclusive representative a right to participate through a system of "cumulative voting" in the selection of faculty-representatives to "meet-and-confer" committees?

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Appellees.

On Appeal from the United States District Court for the District of Minnesota

BRIEF FOR THE APPELLEES

Appellees Leon W. Knight, *et alia,* file this brief in support of the District Court's decision in No. 82-898. Herein, Appellees will demonstrate that, contrary to the assertions of Appellant Minnesota State Board for Community Colleges (Board), the "meet-and-confer" provisions of Minnesota's Public Employment Labor Relations Act (PELRA) are unconstitutional

as applied, even if the act's "meet-and-negotiate" provisions are valid.[1]

STATEMENT OF THE FACTS

Appellees accept the statement of facts in the Board's brief, with two clarifications. First, the Board correctly states that the District Court held the "new [election] procedure to select the faculty's meet and confer representative[s]" "not consistent with its * * * order [of 31 March 1982]" because "this procedure operated to totally exclude nonmembers of the MCCFA from membership on meet and confer committees".[2] The District Court justified its decision, however, not simply on the ultimate result that nonmembers of MCCFA were "totally excluded", but primarily on the requirements of the election procedure itself:

> Any faculty member * * * could nominate a faculty member, including himself or herself, to serve on a meet and confer committee. The MCCFA endorsed six candidates for each committee. All faculty persons were required to vote for six persons for each committee. If they failed to do so, their votes were voided.[3]

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[1] In a separate brief, Appellees respond to the contention of Appellant Minnesota Community College Faculty Association (MCCFA) in No. 82-977 that PELRA properly confers a monopolistic privilege on MCCFA to "meet and confer" with the Board, based on MCCFA's status as exclusive representative in the community colleges.

[2] Brief of Appellant Minnesota State Board for Community Colleges (B.) at 12.

[3] Joint Appendix at A-191.

Appellees Knight, Kjer, and Florin were candidates for election. All other candidates enjoyed MCCFA's endorsement. The effect of the "vote-for-six" rule, then, was to require Knight, Kjer, and Florin, as a condition of voting for themselves, also to vote for at least three of MCCFA's candidates.

Second, the Board incorrectly states that the District Court held that "the Constitution requires a voting procedure which affords a minority faction of the faculty a process which will insure that it can potentially elect a representative [to the 'meet-and-confer' committees] despite its minority status".[4] Actually, the most the District Court has said on the subject is that the Constitution requires the State to "afford every faculty member a fair opportunity to participate in the selection of governance representatives".[5] The District Court mandated a "cumulative-voting" procedure, not as a constitutional right in and of itself, but only as a practical remedy for Appellants' abridgement of Appellees' right to non-discriminatory participation in the "meet-and-confer" process, in the context of experience showing that a simple majoritarian election procedure cannot secure that right.

SUMMARY OF THE ARGUMENT

Although under no constitutional compulsion to create an official forum for communications between administrators and faculty-members in its community colleges, through PELRA Minnesota has established

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[4] B. at 13.

[5] Appendix to Jurisdictional Statement of Appellant Minnesota State Board for Community Colleges at A-23 (footnote omitted).

a statutory "meet-and-confer" process explicitly granting "professional employees" a right to select representatives for conferences with their employer concerning the services they provide to the public. As applied by MCCFA and the Board, however, the statute excludes from the "meet-and-confer" process all nonmembers of the exclusive representative, such as Appellees here, solely on the basis of their nonmembership. In the community colleges, this exclusion denies the State the benefit of the knowledge and expertise of such nonmember employees, in defiance of the statutory purpose; discriminates nonrationally among faculty-members; serves no discernible governmental interests of a "compelling" or "important" nature; and excessively infringes on the beliefs and associational interests of faculty-members who eschew membership in the exclusive representative.

The District Court correctly held that the "meet-and-confer" process is unconstitutional under the First and Fourteenth Amendments insofar as it bars participation by nonmembers of the exclusive representative, and properly mandated a "cumulative-voting" arrangement to remedy this discrimination. To question the District Court's decision entails accepting the self-evidently unconstitutional notion that a State may grant or withhold access to an official forum for communications between citizens and their government solely on the basis of a citizen's mere membership *vel non* in a private special-interest group.

ARGUMENT

Basically, the Board argues that the District Court's decision invalidating the process of electing representatives to "meet-and-confer" committees is wrong because: (i) Knight and the other faculty-members have no First-Amendment right to communicate with community-college administrators through the "meet-and-confer" process; (ii) even if First-Amendment interests were involved, limitation of access to that process to the exclusive representative is reasonable and serves "compelling" governmental interests; and (iii) in any event, the Constitution does not mandate "cumulative voting" in the context of electing faculty-representatives to "meet-and-confer" committees. The Board's argument, however, misses the point on all three particulars.

First, Knight and the other faculty-members do not claim a constitutional right under the First and Fourteenth Amendments to require the Board, or other college-administrators, to "meet and confer" with them. Rather, they assert that Minnesota may not constitutionally grant them, as "professional employees", a statutory right to "meet and confer", and then discriminatorily withdraw that right simply because they choose to remain nonmembers of the exclusive representative, MCCFA. That the "meet-and-confer" process discriminates against Knight and the others because of their beliefs and associational preferences adds insult to First-Amendment values to its blatant denial of equal protection of the laws. But, even if "meet and confer" implicated no First-Amendment interests at all, Knight's claim to nondiscriminatory treatment under the statute would be of constitutional dimension.

Second, the discrimination in the "meet-and-confer" process as applied in the community colleges is patently nonrational, in that it frustrates the very purpose the State asserts for creating the "meet-and-confer" forum, and bears no intelligible relationship either to MCCFA's status as exclusive representative or to its ability (if any) to provide community-college administrators with the accumulated knowledge and expertise of all faculty-members.

Third and last, the District Court's "cumulative-voting" rule is not the enunciation of some new constitutional "right" but merely a practical remedy designed to overcome invidious discrimination that has proven itself inherent in any simple majoritarian selection of "meet-and-confer" representatives in the colleges under the present circumstances.

Moreover, the Board's argument (if carried to its logical conclusion, as *Amicus Curiae* AFL-CIO carries it) would commit this Court to the shockingly *anti*-democratic notion that a State may jury-rig various official fora for communications between citizens and governmental agencies, and then arbitrarily grant or deny access thereto on the basis of the citizens' mere membership *vel non* in private special-interest groups—thereby enhancing or diminishing the political influence of individuals because of their personal beliefs and associations, as manifested in their organizational affiliations or independence.

I. Under the rubric "meet and confer", Minnesota's Public Employment Labor Relations Act creates an official forum for communications between college-administrators and all faculty-members.

Minnesota's Public Employment Labor Relations Act (PELRA)[6] defines "meet and confer" as the "exchange of views and concerns between employers and their respective employees",[7] and then states that:

> (1) The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas regarding all matters [other than statutorily defined "terms and conditions of employment"].
>
> (2) The professional employees shall select a representative to meet and confer with a representative or committee of the public employer on matters [other than "terms and conditions of employment"] relating to the service being provided to the public. * * *[8]

Thus, Minnesota has acknowledged that, in the context of the community colleges, conferences between

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[6] Minn. Stat. §§ 179.61 *et seq.*

[7] Minn. Stat. § 179.63, subd. 15.

[8] Minn. Stat. § 179.73. *See also* Minn. Stat. §§ 179.65, subd. 3; 179.66, subd. 3.

college-administrators and faculty-members are "necessary to the operation and quality of public services and * * * may assist [the administrators] in developing their policies". It has created, or (perhaps more accurately) *recognized,* a right for faculty-members to "meet and confer" with administrators.[9] And it has circumscribed the discretion of those administrators by requiring them to "meet and confer" with the faculty.[10] Or, as the District Court held, "the state has created a forum for the exchange of views * * *. The meet and confer process may not be a general public forum, but it is an important academic forum".[11]

To be sure, PELRA mandates that faculty-members "shall select a representative to meet and confer", rather than exercising that right individually or in *ad hoc* groups.[12] But, as the District Court noted and the Board concedes, "[t]his requirement is separate from the selection of an exclusive representative for purposes of mandatory bargaining";[13] and "[t]his representative is not the 'exclusive representative' ".[14]

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[9] Minn. Stat. § 179.65, subd. 3. As a general matter, "professional employees" had no right to "meet and confer" with their employers prior to enactment of PELRA. Faculty-members in institutions of higher education, however, enjoyed a tradition of self-governance which "meet and confer" merely codified. *See* the District Court's Findings of Fact, and Memorandum Opinion, in Appendix, *ante* note 5, at A-48 to A-49, and A-18.

[10] Minn. Stat. § 179.66, sub. 3.

[11] Appendix, *ante* note 5, at A-22 (footnote omitted).

[12] Minn. Stat. § 179.73, subd. 2.

[13] Appendix, *ante* note 5, at A-19 (footnote omitted).

[14] B. at 7.

In the ultimate analysis, then, exclusive representation is irrelevant to "meet and confer". For, as the District Court observed, "[r]egardless of whether [an exclusive] representative has been selected, PELRA requires some selection system for purposes of the meet and confer process. As applied to higher education, this effectively compels the establishment of a faculty governance system".[15]

In short, Knight's case does not depend on the assertions that the First and Fourteenth Amendments compel college-administrators to listen and speak to him,[16] or that those Amendments somehow inflexibly preserve the specific arrangements for faculty-governance which antedated PELRA.[17] Rather, it rests on PELRA's own creation of the "meet-and-confer" process as "an important academic forum" and "a faculty governance system".

II. By limiting participation in the "meet-and-confer" forum to designees of the exclusive representative, Minnesota's Public Employment Labor Relations Act discriminates among community-college faculty-members on the basis of their beliefs and associational preferences.

As applied in the community-colleges, however, "meet and confer" is not "an important academic forum" and "a faculty governance system" in fact for Knight and the other Appellees, because MCCFA and the Board have arbitrarily excluded them from

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[15] Appendix, *ante* note 5, at A-19.

[16] *Pace* B. at 17-19.

[17] *Pace* B. at 20-22, 26-27.

that "forum", solely on the basis of their nonmembership in MCCFA, and in patent defiance of statutory intent, public policy, community-college traditions, and precepts of academic freedom.

A. Nonmembers of the exclusive representative have been excluded from the "meet-and-confer" process solely because of their beliefs and associational preferences.

PELRA qualifies the "meet-and-confer" rights of "professional employees" such as Knight by mandating that

> [t]he employer shall not * * * meet and confer with any employee or group of employees who are at the time designated as a member or part of an appropriate employee unit except through the exclusive representative if one is certified for that unit * * *, provided that this subdivision shall not be deemed to prevent the communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is part of the employee's work assignment.[18]

Even if the statute requires community-college administrators to "meet and confer" "other than through the exclusive representative" (*e.g.*, with individuals) regarding "communication[s] * * * of advice or recommendations by [faculty-members]" concerning their "work assignment[s]", it explicitly channels all other "communication[s]", on every other "meet-and-confer" topic,[19] "through the exclu-

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[18] Minn. Stat. § 179.66, subd. 7.

[19] And on all "meet-and-negotiate" topics as well. *See* Minn. Stat. § 179.65, subd. 3.

sive representative".[20]

Nevertheless, this designation of the exclusive representative as the unique "meet-and-confer" intermediary between administrators and faculty does not necessarily compel exclusion of nonmembers of the representative from the "meet-and-confer" process. An exclusive representative solicitous of the interests of nonmembers could arrange for their participation in its selection of "meet-and-confer" spokesmen, on an equal basis with its own members. This, however, MCCFA has never done, and claims it need never do. Rather, as the Board concedes, "MCCFA's practice has been to select representatives for the faculty meet and confer committees from its own membership and it has not permitted nonmembers * * * to serve on any of the meet and confer committees".[21] And as the District Court held, "[t]his practice of systematically excluding nonmembers of the MCCFA obviously deprives such persons of a fair opportunity to participate in the meet and confer process".[22]

Admittedly, as the Board relates, Knight and other nonmembers of MCCFA can communicate individually and informally with college-administrators other than through "meet and confer".[23] But such com-

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[20] The proviso to *Minnesota Statutes* § 179.66, subd. 7, was enacted only on 22 March 1982. 1982 Minnesota Session Laws, ch. 568, § 15. The District Court rendered its decision respecting the validity of that subdivision as it existed prior to the amendment. As the discussion in the text points out, though, the proviso has no effect on the District Court's ruling.

[21] B. at 9.

[22] Appendix, *ante* note 5, at A-24.

[23] B. at 9-10.

munications constitute no real alternative to the "meet-and-confer" process because, as the District Court explained,

> [t]he meet and confer committees that presently operate are in fact the exclusive formal governance system for resolving issues outside the scope of mandatory bargaining. * * * The testimony of college administrators confirms that, although persons may still express their individual views outside the formal process, the "official" view of the faculty is the position adopted by the meet and confer committees. Thus, the weight and significance of individual speech interests have been consciously derogated in favor of systematic, official expression. On any issue that has campus-wide impact, it is difficult to imagine that isolated individual views would have any weight when compared to the "official" view of the faculty. If some faculty members are excluded from participation and deliberation in the meet and confer process, they are effectively denied any meaningful expression on the issues resolved through that process.[24]

Moreover, MCCFA bases its discriminatory denial to Knight and other non-MCCFA faculty-members of "meaningful expression on the issues resolved through [the 'meet-and-confer'] process" solely on their beliefs and associational preferences: Participation in "meet and confer" depends on full membership in MCCFA, nothing less. Thus, as the District Court found,

> MCFFA's exclusive authority to select the ["meet-and-confer"] committee representative[s] * * * creates a chilling effect on the associational

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[24] Appendix, *ante* note 5, at A-19 to A-20.

> and speech interests of faculty members. The scope of the meet and confer committees reaches many issues that are integral to the professional function of a college professor. If one risks exclusion from these committees by not joining in or speaking out against the MCCFA, it seems self-evident that one's freedom not to join or to so speak is seriously impaired. This risk of exclusion is inherent in the MCCFA's sole authority to select the committee members. The actual practice only bears out that the risk of exclusion is a real one.[35]

Furthermore, MCCFA's discriminatory exclusion of Knight and other faculty-members from the "meet-and-confer" process is not "viewpoint neutral", as the Board pretends.[36] Rather, MCCFA explicitly complains that its "security" as the exclusive representative in PELRA's "meet-and-negotiate" scheme will be "threatened by an independent meet and confer team".[37] MCCFA banished Knight from the "meet-and-confer" committees, then, not to guarantee "neutral" points of view therein, but instead to preserve the subservience of those committees to its own peculiar ideology and orthodoxy.

That Knight and other nonmembers of MCCFA had an opportunity to vote on MCCFA's original selection as exclusive representative, or may have an opportunity at some distant point in the future to vote for its decertification from that position, does not mitigate the effects of MCCFA's present discrimi-

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[35] *Id.* at A-24.

[36] *Pace* B. at 28-29.

[37] Brief on the Merits of Appellant Labor Organizations at 39-40.

natory exclusion of them from the "meet-and-confer" process.[28] For, as the District Court explained, prior to PELRA, "all faculty members * * * had the right to vote for individual representatives that would deal with issues of college and faculty governance. All faculty members could also seek to serve in such roles". Now, however, "[t]hese rights are * * * completely lost unless one joins the MCCFA".[29] Designation of MCCFA as exclusive representative by their colleagues, therefore, deprived Knight and other nonmembers of that organization of the opportunity they enjoyed prior to PELRA to participate equally with all faculty-members in academic governance, of the opportunity the statute itself affords them in the absence of an exclusive representative, and even of the opportunity MCCFA could provide if it were not afraid to tolerate dissent from its policies. To say that this designation somehow secured Knight "a voice" in the "meet-and-confer" process, as does the Board, is to travesty the facts.[30]

B. Statutory intent, public policy, community-college traditions, and precepts of academic freedom all militate against discriminatory denial of any faculty-member's equal opportunity to participate in the "meet-and-confer" process.

PELRA does not ordain MCCFA's exclusion of nonmembers from "meet and confer". True, the statute commands that the Board "not * * * meet and confer with any employee or group of employees * * *

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[28] *Pace* B. at 36-37.

[29] Appendix, *ante* note 5, at A-28.

[30] B. at 36.

except through the exclusive representative".[21] But it nowhere orders MCCFA to foreclose all meaningful participation by nonmembers in "meet-and-confer" elections, committees, or other activities.

After all, the ultimate intent of PELRA's "meet-and-confer" provisions is to *provide for,* not to suppress, "discussions and the mutual exchange of ideas" between the Board and its "professional employees", because those employees "possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services".[22] Thus, the statute codifies the reality that "restraining teachers' expressions to [a school] board on matters involving the operations of the schools would seriously impair the board's ability to govern the district".[23] The Board's application of the statute, then, is schizophrenic: On the one hand, it implicitly admits what it cannot deny, that "meet[ing] and confer[ring]" with its "professional employees" is "*necessary* to the operation and quality of [the community colleges]". But, on the other hand, it explicitly insists that MCCFA may stifle some portion of this otherwise necessary input, simply because it emanates from nonmembers of that organization.

The Board's self-contradictory application of PELRA flies in the face of what the District Court described as the "[p]ublic policy support[ing] the tradition of participation by all faculty members" in

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[21] Minn. Stat. § 179.66, subd. 7.

[22] Minn. Stat. § 179.73, subd. 1.

[23] City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 175-76 (1976).

academic governance.[34] As that court noted, in general, "[t]he free and full exchange of ideas lies at the core of academia's contribution to our society".[35] And specifically, the court found that, "[t]raditionally, the subjects of meet and confer [in institutions of higher education] have been resolved through governance systems in which all faculty members have an opportunity to participate", and that "governance at community colleges [in Minnesota] prior to PELRA consisted of faculty senates and committees, selected through elections in which every faculty member was eligible to both vote and seek election".[36] The Board's quibble that "[t]here was no *distinct pattern* of faculty governance in the community colleges [before PELRA]" is beside the point.[37] Whether they fit a "distinct pattern" or not, *pre*-PELRA arrangements for academic governance did, in one way or another, involve *all* faculty-members *equally* in the selection-processes for the "faculty senates and committees", in keeping with long-standing traditions in such institutions; whereas, *post*-PELRA, MCCFA has imposed its own "distinct pattern" of intentional discrimination based on faculty-members' membership *vel non* in a private group—a "pattern" patently at odds with sound academic practice as it has evolved in this country.[38]

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[34] Appendix, *ante* note 5, at A-20.

[35] *Id.*

[36] *Id.*

[37] B. at 22 (emphasis supplied).

[38] *See* Brief *Amicus Curiae* of American Association of University Professors at 3-7.

Neither is the Board's contention credible that "[f]aculty members' academic freedom is secure" under MCCFA's discriminatory application of the "meet-and-confer" process.[39] "Academic freedom" imports the ability of teachers to be "exemplars of open-mindedness and free inquiry", and "leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection' ".[40] How community-college faculty can become—or long remain—such "exemplars" and "leaders" when their own employer tells them that, to perform the very consultative services PELRA describes as "necessary to the operation and quality of public services",[41] they must first renounce "open-mindedness and free inquiry", eschew "wide exposure to [a] robust exchange of ideas", and acquiesce in the "authoritative selection" of truth by MCCFA, the Board does not explain. Rather, it glibly begs the question: "Faculty members' academic freedom is secure", the Board contends, because "[t]he only act they cannot do is formally meet and confer with their employer".[42] The issue here, however, is whether an aspect of academic freedom is the ability of each faculty-member to "meet and confer" with his employer, free from discrimination because of his adventitious personal associations.

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[39] B. at 20.

[40] Wieman v. Updegraff, 344 U.S. 183, 196 (1952); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[41] Minn. Stat. § 179.73, subd. 1.

[42] B. at 20.

In short, MCCFA's discriminatory application of PELRA's "meet-and-confer" provisions finds no justification in ultimate statutory intent, community-college traditions, or basic precepts of academic freedom. Rather, it reflects simply MCCFA's arrogant demand to monopolize the "meet-and-confer" forum for its own members, notwithstanding the detrimental effects of that monopolization on the ability of excluded faculty-members to perform their professional functions, and on the State's own interest in receiving the benefits of those persons' "knowledge, expertise, and dedication".[48]

III. Limiting participation in the "meet-and-confer" forum to designees of the exclusive representative thwarts the State's expressed purpose in establishing the forum, lacks a rational basis, serves no compelling governmental interest, and is not the least-restrictive alternative for regulating communications between college-administrators and faculty-members.

Thus, whether this Court views PELRA's "meet-and-confer" system either as the creation of a new, statutory right of access of public employees to their employers, or as the recognition (in the special context of higher education, at least) of the traditional right of faculty self-governance, with all its First-Amendment implications, the result is the same: Appellants have discriminatorily denied Knight and the other Appellees any participatory role in the "meet-and-confer" forum, solely on the basis of their non-membership in MCCFA. And this discrimination is

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[48] Minn. Stat. § 179.73, subd. 1.

repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it contravenes the State's explicitly articulated purpose in establishing "meet and confer", lacks a rational basis, serves no compelling public interest, and excessively infringes on Appellees' interests in academic freedom, and in freedom of speech, belief, and association.

A. The State's purpose in establishing the "meet-and-confer" process is to provide public employers with the benefit of the knowledge and expertise of *all* their professional employees.

Where, as here, fundamental liberties are involved, mere speculation or *ex post facto* rationalizations by Appellants' counsel as to Minnesota's possible interests in the "meet-and-confer" system lack any probative force.[46] Instead, this Court must consult only the purpose the State has articulated in PELRA as the justification for "meet and confer".[47] This purpose PELRA discloses in unequivocal language:

> The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange

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[46] *In re* Primus, 436 U.S. 412, 434 n.27 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789-90 (1978).

[47] *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 525 (1960); Schneider v. Town of Irvington, 308 U.S. 147, 161 (1939).

of ideas regarding all matters not specified under ["terms and conditions of employment"].[46]

On its face, this provision repels any interpretation other than that the State seeks *equal* participation in "meet and confer" by *all* its "professional employees" (such as Knight and his colleagues). Especially in Minnesota's institutions of higher education, the involvement of *all* faculty-members is "necessary to the operation and quality of public services", because each instructor has *unique* "knowledge, expertise, and dedication" in his particular field of specialization, and because a "faculty" functions properly only when it combines *full* participation by *every* member. Indeed, in the special context of a college-faculty, where each member is selected precisely because of his own personal ability to contribute in a mutually complementary fashion to the total educational process, PELRA clearly contemplates "discussions and the mutual exchange of ideas" that maximize involvement by faculty-members as individual components of the educational system as a whole, not as members of some smaller group.

That PELRA requires that "professional employees shall select a representative to meet and confer with a representative or committee of the public employer",[47] or even that the statute designates the exclusive representatives as the "meet-and-confer" representative,[48] does not necessarily thwart or render inconsistent the legislature's expressed intent to in-

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[46] Minn. Stat. § 179.73, subd. 1.

[47] Minn. Stat. § 179.73, subd. 2.

[48] Minn. Stat. § 179.66, subd. 7.

volve all professional employees in "helpful and necessary" dialogue with their employers. For even an exclusive representative could arrange for selection of "meet-and-confer" committees through a non-discriminatory system in which all employees participated, and by which each employee enjoyed a fair opportunity to serve on the committees, regardless of his private associational preferences.[*]

B. Excluding nonmembers of the exclusive representative from the "meet-and-confer" process is a nonrational discrimination.

As applied by MCCFA and the Board, however, PELRA's "meet-and-confer" system was discriminatory. Indeed, Appellants arbitrarily limited participation in the "meet-and-confer" forum to members of MCCFA alone, patently frustrating the State's own purpose in creating that forum, without any rational basis in statutory language or intent.

PELRA declares that "[t]he legislature recognizes that professional employees possess knowledge, expertise, and dedication". Nowhere does the statute suggest that this "knowledge, expertise, and dedication" is a peculiar attribute of members of MCCFA (or any other private organization), or of those individuals whom MCCFA unilaterally selects to "meet and confer" with the Board. Indeed, if the legislature

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[*] Indeed, the District Court's various orders, ultimately providing for a "cumulative-voting" arrangement under the auspices of MCCFA, demonstrate a practical resolution of the merely apparent tension between the statutory requirements that all professional employees participate in "meet and confer", on the one hand, and that their representative for this purpose be the exclusive representative, on the other hand.

had entertained such a fantastic notion, it would have made participation in the community-college faculty itself contingent on membership in MCCFA. That it did not emphasizes the nonrationality of any argument that MCCFA should control entry into the "meet-and-confer" process because it has some special status. Participation in "meet and confer" in the colleges depends upon an individual faculty-member's own "knowledge, expertise, and dedication"—that is, his personal, professional status as an educator—not upon his adventitious allegiance *vel non* to a private, self-interested group without the intervention of which in faculty-governance the colleges functioned satisfactorily before the advent of PELRA.

Similarly, although PELRA does require that professional employees select a "representative" for purposes of "meet and confer", nowhere does the statute suggest that this representative must, should, or even may exclude from the process any employee who "possess[es] knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services". Indeed, if the legislature had intended to delegate such a discriminatory license, it would have specifically enjoined public employers to "meet and confer" with no employee who is not a member of the exclusive representative, rather than requiring "meet and confer" to function merely "*through* the exclusive representative".[**] This emphasizes the nonrationality of any argument that, to maintain its official position as exclusive representative, MCCFA must monopolize selection of "meet-and-confer" participants. MCCFA will retain its posi-

[**] Minn. Stat. § 179.66, subd. 7 (emphasis supplied).

tion as exclusive representative in the colleges no matter whom it selects, or allows to be selected by the entire faculty "through" its intermediation, as representatives in "meet and confer". The question, however, is whether it has any rational basis for demanding an *additional* license to discriminate among faculty-members in whatever selection-process it ultimately employs (or the courts order it to employ), solely because of those individuals' beliefs and associations. Such a basis is conspicuous by its absence.

C. No compelling state interest supports monopolistic access to the "meet-and-confer" process for the exclusive representative.

Its blatant nonrationality condemns Appellants' discriminatory application of PELRA's "meet-and-confer" provisions as unconstitutional under the Fourteenth Amendment. Even if some reason were forthcoming in its support, though, such discrimination would be unconstitutional anyway, because it serves no governmental interest sufficiently important to override the First-Amendment interests Knight and his colleagues have in speaking to the Board.

As the District Court explained,

> MCCFA's exclusive authority to select the ["meet-and-confer"] committee representative * * * inherently creates a chilling effect on the associational and speech interests of faculty-members. The scope of the meet and confer committees reaches many issues that are integral to the professional function of a college professor. If one risks exclusion from these committees by not joining or speaking out against the MCCFA,

> it seems self-evident that one's freedom not to join or to so speak out is seriously impaired. This risk of exclusion is inherent in the MCCFA's sole authority to select the committee members. The actual practice only bears out that the risk of exclusion is a real one.
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> Because these effects infringe fundamental First Amendment guarantees, the MCCFA's exclusive selection authority can be upheld only if it is supported by compelling, legitimate state interests * * *. We find no such interests here."[11]

In this conclusion, Knight and the other faculty-members concur, for two reasons: (i) Neither this Court nor the District Court has ever held that *compelling* governmental interests support *any* form of exclusivity. And (ii) even if such interests supported exclusivity for purposes of PELRA's "meet-and-negotiate" scheme, they would not validate the significantly different "meet-and-confer" process.

1. As Appellees detail in their brief in No. 82-977, the judicial history of exclusive representation contains no approbation, only condemnation of the scheme as "a delegation of legislative power * * * unknown to our law", "utterly inconsistent" with the Constitution, and "intolerable".[12] Certainly no decision of this Court, or even of the District Court, has held that exclusive representation in private or public employment subserves compelling governmental interests. Indeed, far from itself finding any governmental interests "compelling" as far as ex-

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[11] Appendix, *ante* note 5, at A-24.

[12] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

clusive representation under PELRA is concerned, the District Court simply stated that "[t]he *Abood* decision is controlling here", as if that case had somehow settled the question of the constitutionality of exclusive representation in public employment.[53] *Abood,* however, had nothing to do with exclusive representation.[54] Moreover, in reaching its decision, the *Abood* plurality relied on mere "rational-basis" analysis (not the compelling-state-interest test), disqualifying *Abood* as a precedent in a situation such as this.[55]

2. The District Court was correct, nonetheless, in distinguishing exclusive representation in the context of PELRA's "meet-and-negotiate" scheme from exclusivity under the statute's quite different "meet-and-confer" system. First, the court noted how, "[i]n higher education, * * * faculty members have long enjoyed substantial formal and informal participation in college governance—present here in the form of faculty senates prior to PELRA", and recalled that "[s]uch a tradition of shared decisionmaking has not been generally true in other areas of employment".[56] Second, the court explained that, although the subject-matter of "meet and negotiate" is of a "largely economic, tangible nature", and although "it

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[53] Appendix, *ante* note 5, at A-12 (footnote omitted), *referring to* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[54] Brief for the Appellees in No. 82-977, at 33-37.

[55] *Compare* Abood, 431 U.S. at 217-26 (opinion of Stewart, J.), *with id.* at 245-54 (Powell, J., concurring in the judgment), and *with* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 528 & n.7 (1981) (opinion of Brennan, J.).

[56] Appendix, *ante* note 5, at A-25.

is thought that * * * the tangible benefits of bargaining flow to both members and nonmembers [of the exclusive representative] alike", "[t]he subjects of meet and confer * * * are generally intangible issues of governance", and "[i]t simply cannot be said that the benefits of conferring on such issues flow equally to persons who are excluded from conferring".[87] Third, the court denied that "[u]nion security will * * * be jeopardized by allowing nonmembers of the MCCFA to participate in selection of meet and confer representatives", emphasizing that "MCFFA remains the exclusive representative for all matters subject to the mandatory bargaining provisions [of PELRA]", and that "[n]o rival unions could simultaneously represent community college faculty".[88] Fourth and last, the court rejected the fear that the Board "would be subject to irreconcilable demands from rival unions", in as much as "meet and confer" requires no bargaining at all, and "the mandatory bargaining process [of 'meet and negotiate'] remains under the sole control of the MCCFA".[89]

Thus, the District Court pre-emptively exploded the basic complaint the Board now makes against its decision: namely, that that court's ruling somehow

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[87] *Id.* at A-25, A-26. Appellees, of course, reject as scientifically absurd the notion that all employees necessarily benefit at all, let alone equally, from collective bargaining. *See, e.g.*, Bradley, "Involuntary Participation in Unionism", *in Labor Unions and Public Policy* (Am. Enterprise Inst. 1958). But, if that thesis is rationally untenable even where such relatively objective matters as wages and hours are concerned, it can hardly apply to what the District Court properly described as "intangible issues".

[88] Appendix, *ante* note 5, at A-26.

[89] *Id.* at A-27.

subverts "[t]he governmental interest in meeting and conferring with a single employee representative".[60] This argument is obviously meritless. Under the District Court's "cumulative-voting" requirement, at most the internal composition of the "meet-and-confer" committee at each level of college-governance may change; but, just as before, only one such committee will exist at each level, none the less. For example, at the state level, the Board itself may not necessarily "meet and confer" with a committee representing the faculty that contains members of MCCFA only; but it will "meet and confer" with only one committee. This result satisfies the sole governmental interest the Board has asserted here. For, as the District Court noted, "[t]he state does not contend that it has a legitimate interest in excluding nonmembers of the MCCFA from serving on meet and confer committees", only that "the meet and confer process must be an orderly, systematic one", which interest "can be fully served without excluding nonmembers of the MCCFA".[61]

D. The least-restrictive alternative is to grant all faculty-members a fair opportunity to participate in the "meet-and-confer" process.

No one can rationally gainsay that, to some extent or other, the First-Amendment interests of Knight and his colleagues are at stake in this litigation. Self-evidently, MCCFA has demanded monopolistic access

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[60] B. at 33.

[61] Appendix, *ante* note 5, at A-24, A-25.

to the "meet-and-confer" process, not to guarantee the neutrality of that forum, but instead to assert its own peculiar orthodoxy as the "official voice" of every faculty-member, by stifling the expression of all dissenting opinions. This monopoly, of course, serves MCCFA's self-interest quite nicely. But it frustrates the State's purpose in enacting "meet and confer".[62] And it is hardly the means least-restrictive of Appellees' interests in freedom of speech and belief to achieve Minnesota's legitimate labor-relations goals.

As the District Court held, "[t]he ['meet-and-confer'] process would be no less orderly * * * if both members and nonmembers of the MCCFA participated".[63] Yet, under these conditions, Appellees' First-Amendment interests would receive significantly greater protection than under the discriminatory application of PELRA the District Court struck down. And, under the District Court's most recent "cumulative-voting" order, Appellees' interests would receive the greatest measure of protection, consistent with "orderly" administration of the "meet-and-confer" process. The District Court's latest ruling, then, is the least-restrictive alternative (at least in comparison to alternatives available heretofore): It serves the State's interest in structuring "meet and confer" around a single employee-committee at each level, while simultaneously guaranteeing as much as possible that all employees will enjoy a fair opportunity to participate in the selection of, or to function

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[62] *See ante*, pp. 19-21.

[63] Appendix, *ante* note 5, at A-25.

as, members of those committees, regardless of their nonmembership in MCCFA."

IV. The District Court's "cumulative-voting" requirement is a permissible means to guarantee nonmembers of the exclusive representative a nondiscriminatory opportunity to participate in the "meet-and-confer" process.

Unable to disprove that the District Court's "cumulative-voting" requirement is the least-restrictive alternative, the Board attacks it because other supposed alternatives are "democratic, reasonable and fully consistent with the district court's mandate of a fair opportunity to participate [in the 'meet-and-confer' process]".[64] First, asserts the Board, the "cumulative-voting" requirement is unnecessary because Knight and his colleagues "have the right to vote for their meet and confer representative when they elect their exclusive representative".[65] This simply misstates what actually transpired under PELRA as MCCFA and the Board applied it. True, Knight and the other faculty-members had an original right to vote for or against MCCFA as exclusive representative, and would presumably have a similar right to vote in any future election decertifying MCCFA and

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[64] Revealingly, Appellants do not even attempt to argue that MCCFA's original "meet-and-confer" monopoly was the least-restrictive alternative, let alone to provide the "clea[r] demonstration" of that fact necessary to their case. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 265 & n.29 (1963) (Brennan, J., concurring).

[65] B. at 37.

[66] *Id.*

designating some other organization to fill that role."[67] However, once MCCFA became the exclusive representative, *it and its members alone,* not Knight and other nonmembers, designated the specific individuals serving on the "meet-and-confer" committees. Having the right to vote "when they elect[ed] MCCFA as their exclusive representative" thus resulted in the nonmembers' *loss* of any "right to vote for their meet and confer representative"—and, under the Board's errant interpretation of PELRA, would result in such a loss whatever the identity of the exclusive representative. Moreover, Knight and his colleagues have had only one opportunity in over ten years to "elect their exclusive representative" (and may never have another such chance, unless MCCFA loses majority-support among the faculty). But the members of the various "meet-and-confer" committees are elected each year. If this is "democracy", it is the fraudulent variety Eastern European "people's republics" practice, not what our Constitution contemplates.

Second, says the Board, the "cumulative-voting" requirement is excessive, because Appellees' right to vote for "meet-and-confer" representatives was protected by Appellants' "revised meet and confer selection procedure".[68] Actually, the precise opposite occurred. As the District Court explained in its order mandating "cumulative voting", under Appellants' "revised" system "meet and confer"

> [c]ommittee members were selected through the following election procedure: The MCCFA con-

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[67] *See* Minn. Stat. § 179.67.

[68] B. at 39.

> vened a general meeting of faculty. Any faculty member present could nominate a faculty member, including himself * * *, to serve on a meet and confer committee. The MCCFA endorsed six candidates for each committee. *All faculty persons were required to vote for six persons for each committee. If they failed to do so, their votes were voided.* As a result of this election procedure, no non-MCCFA member was elected to be a meet and confer representative for this school year [1982-1983]. As long as MCCFA members continue to constitute a majority of the faculty persons voting and they vote for the union endorsed slate, no non-MCCFA member can ever be elected.[69]

Thus, the reality of Appellants' "revised" system was that, as a condition of voting for themselves, Knight, Kjer, and Florin (the three Appellees who were candidates for the "meet-and-confer" committees) were required to vote for candidates MCCFA endorsed. In order to exercise their own freedoms of speech, belief, and non-association, and to protect their academic freedom, then, Appellees had to forfeit those freedoms (at least in part) by supporting partizans of the very organization that has intentionally suppressed their liberties over the last decade, and used every means at its disposal to frustrate vindication of those freedoms in this litigation.[70] And, even so, under the present conditions in the community colleges, "no non-MCCFA member can ever be elected [to the 'meet-and-confer' committees]". Such an arrangement may constitute what the Board calls "a fully democratic election in which each faculty mem-

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[69] Joint Appendix at A-191 (emphasis supplied).

[70] *See post*, notes 93-94 & accompanying text.

ber could participate"[11] in the Eastern European slave-states, where the "party" selects the winning candidates in advance; but it is hardly "democracy" as people in this country have traditionally understood the term.

Third, argues the Board, the District Court's "cumulative-voting" requirement "erroneously results in the imposition of a constitutional mandate of proportional representation on meet and confer committees".[12] This mischaracterizes the situation. The "constitutional mandate" the District Court has enforced against Appellants is "the opportunity [for Knight and his colleagues] to participate meaningfully in the meet and confer process".[13] To be sure, as the Board notes, "[t]here is no precedent for" a "cumulative-voting" remedy to protect instructors' "opportunity to participate meaningfully" in dialogue with college-administrators. But this happenstance is irrelevant. If recourse to a "precedent" were necessary to strike down every novel infringement of fundamental constitutional liberties, the courts would be powerless to enforce the Constitution against imaginative violators. The Board forgets that the District Court did not impose "cumulative voting" as a constitutional right when it originally declared "meet and confer" invalid as applied. The court merely held that "[t]he present practice of having the MCCFA select all representatives on meet and confer committees is unconstitutional", and that PELRA's "meet-and-confer" provision "is valid as

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[11] B. at 39.

[12] *Id.* at 40.

[13] Joint Appendix at A-192.

applied to community colleges only if all faculty members have a fair opportunity both to select and serve as governance representatives".[74] The court adopted "cumulative voting" as a remedy for the violation of a constitutional right only after MCCFA and the Board had proven, through their actions, that they did not intend to afford "all faculty members * * * a fair opportunity both to select and serve as governance representatives"—but instead, through the "vote-for-six" requirement, sought to perpetuate MCCFA's unconstitutional monopoly over the "meet-and-confer" process.

Finally, the Board complains, "[t]he cumulative voting requirement imposes a substantial and continuing burden", because "[f]aculty may coalesce into formal or informal interest groups which are unrelated to a union animus"—all of which groups, the Board implies, would be entitled to some sort of proportional representation on the "meet-and-confer" committees.[75] This complaint disregards the basis of the District Court's orders: namely, that faculty-members needed protection for their First-Amendment liberties against MCCFA because MCCFA had abridged those liberties through oppressive exercise of its special statutory privilege of exclusive representation. The District Court eventually settled on "cumulative voting" as a remedy for unconstitutional discrimination in MCCFA's favor arising out of its special status. Obviously, this ruling can have no application whatsoever to "formal or informal in-

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[74] Appendix, *ante* note 5, at A-30.

[75] B. at 41.

terest groups *which are unrelated to a union animus*", because the ruling rests in the first instance on a dichotomy between members of MCCFA (who as members of the exclusive representative could participate meaningfully in "meet and confer" under Appellants' faulty interpretation of PELRA) and nonmembers of that organization (who could not so participate).

V. Sustaining the notion that a State may create a forum for communications between citizens and public officials, and then discriminatorily deny access to such a forum on the basis of a citizen's mere nonmembership in a private special-interest group, will license the States radically to transform traditional political structures in this country.

Ultimately, its patently empty make-weight arguments aside, the Board proffers a basic apology in support of MCCFA's monopolistic access to the "meet-and-confer" process: namely, that Minnesota may properly grant MCCFA that monopoly, because it has also granted MCCFA the monopolistic "special status" of exclusive representative.[16] This claim, of course, begs the question of the constitutionality of exclusive representation, for which no one has ever provided a rational defense.[17] But, even pretermitting the exclusive-representation issue, the Board's assertion implicates a daring thesis, made explicit by *Amicus Curiae* AFL-CIO, that government may condition a citizen's opportunity to participate in discussions of public policy with public officials upon

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[16] *Id.* at 29-32.

[17] *See* Brief for the Appellees in No. 82-977, at 15-24.

his membership in a particular private organization."[78] That this Court's sanction for such a notion would license the States—and, presumably, Congress as well—radically to restructure American political institutions along corporative-state lines emphasizes the importance of sustaining the District Court's decision on "meet and confer".

According to the AFL-CIO, "a right to associate with others for purposes of expressive activity inheres in the First Amendment"; but "the asserted right to refuse to associate is not entitled to the full measure of solicitude reserved for core First Amendment rights".[79] "[T]he First Amendment protection accorded the right to refrain from government compelled expression * * * may not pertain in circumstances in which affirmative speech would be fully protected", says the *Amicus,* because, "[b]y joining together, individuals are able to enhance the strength of their own voices, particularly as to governmental matters, and thereby to foster the free exchange of ideas the First Amendment is itself designed to foster"; whereas, "[a]n individual who refuses to express his * * * views, or to associate with others for the purpose of communicating views, is quite obviously not enhancing the full discussion of matters of public concern which it is a primary purpose of the First Amendment to promote".[80] Therefore, the AFL-CIO concludes, in as much as "governmental action that

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[78] *See* Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Appellants (AC.) at 4.

[79] *Id.* at 7, 9 (footnote omitted).

[80] *Id.* at 10, 12.

impairs the ability of individuals to remain isolated from the expressive activity of others does not impair the 'marketplace of ideas' which the right of free association primarily fosters", such "action" is legitimate (if not actually compelled) under the First Amendment.[51] Indeed, asserts the *Amicus*, "the theory that the government may not have any dealings with organized groups of its citizens where unaffiliated individuals protest is unworthy of serious consideration".[52] What the AFL-CIO does not say is that the "dealings with organized groups of * * * citizens" it believes "the government may * * * have" involves those "organized groups" posturing as the authorized representatives of "unaffiliated individuals [who] protest", and that the "governmental action that impairs the ability of individuals to remain isolated from the expressive activity of others" which it advocates involves imposing "organized groups" as exclusive representatives of "unaffiliated individuals" as a condition of those individuals' receipt of governmental benefits.

This idea is nothing new. No, indeed. Rather, it is the basic tenet of the old fascist-syndicalist, or corporativistic, form of political organization. In the incarnation of that system made famous for its efficiency and fairness under the benevolent rule of *Il Duce* Benito Mussolini, the Italian government recognized "syndical organizations" with the right of representing all individuals within a given occupational group, including "unaffiliated individuals [who] protest", in relation to all political-economic ques-

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[51] *Id.* at 13.

[52] *Id.* at 15.

tions affecting the group."[63] This privilege "of existing as a separate legal entity and of representing all the members of a given occupational group whether they belong[ed] to the syndicate or not, [was] the fundamental prerogative of the Fascist syndical association".[64] Of course, today this selfsame privilege is the essence of MCCFA's status as exclusive representative under PELRA, too, and the obvious (albeit unidentified) model for *Amicus* AFL-CIO's "organized groups of * * * citizens" for the benefit of which government should "impai[r] the ability of individuals to remain isolated from * * * expressive activity".

Novel—or, perhaps more accurately put, shocking—is the AFL-CIO's claim that imposing on public employees (and, presumably, all other groups in society) the essential arrangements of fascist-syndicalism will actually promote "the free exchange of ideas the First Amendment is itself designed to foster"; whereas, those who oppose fascistic institutions and practices are actually "not enhancing the full discussion of matters of public concern which it is a primary purpose of the First Amendment to promote".[65] Apparently, the real author of the brief *amicus curiae* was George Orwell, and its real message the slogan of Oceania that "freedom is slavery" (or *vice versa*).

To sustain PELRA's "meet-and-confer" system as MCCFA and the Board have applied it, consistently with *Amicus* AFL-CIO's reasoning, this Court must acknowledge the power of government: (i) to recog-

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[63] *E.g.*, F. Pitigliani, *The Italian Corporative State* (1933), at 20-26, 32-33.

[64] W. Welk, *Fascist Economic Policy* (1930), at 76.

[65] AC. at 12.

nize private special-interest organizations as the exclusive representatives of occupational (and perhaps other) groups, including individuals within those groups who protest such forced representation; (ii) to deny nonmembers of the organizations within the occupational groups (and *a fortiori* the general public, too) any privilege to participate in the organizations' internal decision-making processes;[86] (iii) to privilege the organizations to require public officials to meet and confer regarding the development and implementation of public policies, with nonmembers of the organizations and the general public excluded from the discussions;[87] and (iv) to grant these private special-interest organizations tax exemptions or tax-supported subsidies, or other governmentally coerced payments for their lobbying and associated political action.[88] But, to acknowledge all these supposed governmental powers would be for this Court to ally itself—and the Constitution—fully with fascistic principles.[89] Such an alliance, no doubt, the AFL-CIO would welcome, as a legalistic rationalization for its on-going political program to restructure all of American industry along corporativistic lines.[90] And,

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[86] *Id.* at 15-16.

[87] *Id.* at 14-15.

[88] *Id.* at 16-17. *See* Minn. Stat. § 179.65, subd. 2 (power of exclusive representative to compel nonmembers to pay "fair-share fees").

[89] *See* F. Pitigliani, *ante* note 83, at 20-26.

[90] *See* R. Marshall, *et alia, An Economic Strategy for the 1980s: The Failure of Reagonomics and the Full Employment Alternative* (1982), at 44-47, *in* Appendix to Brief for the Appellees in No. 82-977.

equally without doubt, this Court's agreement with the *Amicus* that "syndical associations" such as MCCFA have such powers, even in the relatively confined context of PELRA's "meet-and-confer" process, the AFL-CIO would also welcome—for, just as under Italian fascism, "[t]he [legal] establishment of these [syndical] associations may be regarded as the first practical result on a large scale of the corporative policy".[21]

Appellees, of course, assume that no members of this Court would wittingly endorse corporativism as constitutionally legitimate, let alone as particularly favored under the First Amendment. But, because such an endorsement would constitute the true political-economic meaning of this Court's reversal of the District Court, no matter what rationale the Court's majority offered for its action, Appellees urge each member of the Court to focus on what is really at stake in the seemingly minor "meet-and-confer" issue. It is not simply whether Knight and his colleagues will enjoy a meaningful opportunity for dialogue with college-administrators concerning the performance of their duties as instructors, although that opportunity is important to them as individuals, and to all of American higher education. Instead, it is whether the nation's political and economic processes will remain open and pluralistic free markets of both ideas and goods, or whether fascistic arrangements will close those markets to all but the leaders of politically powerful special-interest organizations, operating in collusion with pliant politicians and administrators to the detriment of the public interest, as all monopolists always do.

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[21] F. Pitigliani, *ante* note 83, at xii-xiii.

VI. The District Court's award of costs is reasonable, in light of that Court's opportunity to review the record firsthand.

Finally, the Board trivializes this case by seeking a reduction of costs the District Court awarded Appellees on the "meet-and-confer" issue.[92] It hardly behooves the Board, let alone MCCFA, however, to blather about the District Court's supposed "abuse of discretion" in its award of costs, in a case which abounds with false testimony given under oath, suppression of evidence, and purported "findings of fact" categorically at odds with the record—none of which abuses either the District Court, or other courts, have bothered to address, let alone correct. And surely, if this Court was too busy or too insouciant to concern itself with the District Court's refusal to investigate and punish a massive conspiracy to falsify, conceal, and distort evidence,[93] or with the District Court's own fabrication of "findings of fact" in the face of overwhelming and unchallenged evidence to the contrary,[94] it should have no time or inclination now to dissect the District Court's mere apportionment of costs.

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[92] B. at 41-44.

[93] *See* Petitioners' Appendices, *In re Knight*, No. 79-1910 (8th Cir., filed 24 October 1979), *motion for leave to file petition for mandamus denied*, 444 U.S. 821 (1979), *petition for mandamus denied*, 614 F.2d 1162 (8th Cir. 1980), *cert. denied*, 449 U.S. 823 (1980).

[94] *See* Jurisdictional Statement in No. 82-901 (filed 1 December 1982), at 27-29, *and* Appendix to Jurisdictional Statement in No. 82-901, at 151-437, *judgment aff'd without opinion*, —— U.S. ——, 103 S. Ct. 1493.

CONCLUSION

This Court should affirm the decision of the District Court on the "meet-and-confer" issue, including its order mandating "cumulative voting" for "meet-and-confer" representatives.

Respectfully submitted,

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Nos. 82-977 & 82-898

IN THE

Supreme Court of the United States

October Term, 1982

MINNESOTA STATE BOARD
FOR COMMUNITY COLLEGES,
Appellant,

and

MINNESOTA COMMUNITY COLLEGE
FACULTY ASSOCIATION,
MINNESOTA EDUCATION ASSOCIATION,
and NATIONAL EDUCATION ASSOCIATION,
Appellants,

v.

LEON W. KNIGHT, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF MINNESOTA, FOURTH DIVISION

REPLY BRIEF OF APPELLANT LABOR ORGANIZATIONS

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MINNESOTA STATE BOARD
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INTRODUCTION

Appellants Minnesota Community College Faculty Association ("MCCFA"), Minnesota Education Association ("MEA") and National Educational Association ("NEA") (collectively referred to as the "appellant labor organizations"), file this brief in reply to the briefs of the appellees in Nos. 82-898 and 82-977.

ARGUMENT

A. Appellees Have Suffered No Infringement Of Their First Amendment Rights

Appellees make three concessions of fundamental importance. First, appellees concede that neither the First nor the Fourteenth Amendments grant to community college instructors the right to meet and confer with appellant Minnesota State Board for Community Colleges ("State Board"). The meet and confer right arises solely from statute. Brief of Appellees, No. 82-898, 3-5. Second, appellees concede that the meet and confer function may occur on a representational basis. Brief of Appellees, No. 82-898, 20-21. Third, appellees concede that they can and do express their views to community college administrators outside the meet and confer process. Brief of Appellees, No. 82-898, 11. Appellees nevertheless claim that their exclusion from participation as members of the MCCFA's meet and confer committees is an unconstitutional discrimination which is "repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

While the appellees, unlike the lower court, purport to invoke the Equal Protection Clause of the Fourteenth Amendment in support of the lower court's judgment, their argument

adds little to the analysis of this case. This Court noted in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972), that a classification which is challenged on the basis that it discriminates according to the content of protected speech activity involves a situation where "the equal protection claim is closely intertwined with First Amendment interests." Where a governmental action discriminates on the basis of protected First Amendment interests, the action will be "carefully scrutinized" and must be supported by "a substantial governmental interest." *Id.* at 99. This analysis does not avoid the central question before the Court: whether PELRA's "meet and confer" provisions, as applied by the MCCFA and the State Board, infringe upon First Amendment interests. If the "meet and confer" system does not impinge appellees' First Amendment interests, then it does not burden a fundamental right and "need not be tested by the strict scrutiny applied when government action impinges upon a fundamental right protected by the constitution." *Perry Education Ass'n v. Perry Local Educator's Ass'n*, —— U.S. ——, 74 L.Ed.2d 794, 810 (1983).

In the initial brief, appellant labor organizations set forth several reasons why PELRA's meet and confer provisions, as applied, do not infringe upon appellees' First Amendment rights. None of these reasons have been persuasively refuted by appellees.

First, appellees have no First Amendment right to compel the State Board to listen and respond to them. This the appellees concede. It follows from this proposition that the government may decide, unencumbered by constitutional restraint, with whom it will confer concerning policy decisions. Were this not the case, the decision of a governmental official to

confer with one person or group would necessarily create a right to confer with that governmental official in any other person or group which asserted a right to equal treatment. Effectively, the result would be the creation of a right which appellees' concede they do not have: the absolute right to compel the government to listen and respond. The only other theoretical possibility would be the plainly implausible suggestion that the government official consult with no one. Where the government creates a forum, public or non-public, certain constitutional constraints may apply in limiting access to that forum. Where the activity in question, however, is private consultation by governmental officials, no forum exists and the First Amendment does not dictate with whom the government must consult. Because meet and confer is such consultation, appellees raise no First Amendment interest when they complain of exclusion from meet and confer committees.

Second, even if meet and confer is treated as a non-public forum, the limitations of access which exclude appellees from being on the MCCFA's meet and confer committees are reasonable and do not amount to an effort to suppress appellees' expression because the state opposes their views. Meet and confer thus passes muster under *Perry Education Ass'n v. Perry Local Educators' Ass'n, supra*. Appellees, for their part, ignore *Perry Education Ass'n*.[1] In doing so, appellees ignore decisive precedent that a public employer's decision to limit

[1] In their brief in No. 82-977, the appellees assert that *Perry Education Ass'n* does not preclude their argument that the entire concept of exclusive representation is unconstitutional. Brief of Appellees, No. 82-977, 14, 23-24. In the brief which addresses the issues raised by this appeal—that in No. 82-898—the appellees fail to even cite *Perry Education Ass'n*.

access to a non-public forum to the exclusive representative of that employer's employees is reasonable and content-neutral.

Third, any distinction which is made in the selection of the meet and confer representative is based only on who was and who was not selected by the majority of community college faculty members to be their meet and confer representative. PELRA provides that there is only one meet and confer representative. Where a meet and negotiate representative has been selected by the employees, that representative is also the meet and confer representative. *See*, Brief of Appellant Labor Organizations, 6-7, 31-35. Having been selected in a democratic manner encompassing all faculty members to function as the meet and confer representative, the MCCFA chooses persons to speak for it in meet and confer sessions. This selection process is no different than the selection of persons to perform any number of functions on behalf of the organization—from election of officers to selection of a negotiations team. No one would argue that a non-member of an organization has any right to participate in choosing that organization's officers. Indeed, this Court has held that the First Amendment freedom of association of the members of an association is violated where the state acts to force the involvement of outsiders in the internal functions of that association. Thus, in *Cousins v. Wigoda*, 419 U.S. 447 (1975), the Court ruled that a state could not constitutionally override the procedures established by the Democratic National Party for selection of delegates to the party's national convention. Similarly, the Court ruled in *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981), that the First Amendment right of association precluded a state from indirectly interfering with the process by which delegates are chosen to the Democratic National Convention. In that case,

the state law requiring that delegates to the convention be bound by the results of Wisconsin's "open" presidential primary election was found to be an unconstitutional interference with the National Party's rules limiting the right to participate in delegate selection to persons declaring preference to the Democratic Party. The MCCFA and its members also have the First Amendment right to limit participation on the committee which will represent the MCCFA in the meet and confer process to those persons who are members of the association, and can be expected to express the views of the organization and which are also the views of the majority of community college instructors who selected that organization.

> Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.

L. Tribe, *American Constitutional Law*, 791 (1978).

The lower court and the appellees purport to meet this contention by asserting that in the system of academic governance used in some community colleges prior to PELRA, faculty members "had the right to vote for individual representatives that would deal with the issues of college and faculty governance." Brief of Appellees, No. 82-898, 14. They further argue that the democratic selection of the MCCFA "deprived Knight and other non-members of that organization of the opportunity they enjoyed prior to PELRA to participate equally with all faculty members in faculty governance . . ." *Id.* This statement, of course, is false. The appellees were *part* of the process which designated the MCCFA as the meet and confer representative.

PELRA does not, as argued by appellees, grant individual professional employees the right to meet and confer "and then discriminatorily withdraw that right simply because they choose to remain nonmembers of the exclusive representative, MCCFA." Brief of Appellees, No. 82-898 at 5. PELRA grants to professional employees only a right to participate in designating a meet and confer representative. The same provision which establishes the meet and confer right requires that meet and confer occur through a single representative. Minn. Stat. §179.73 (1982). PELRA reduced the number of governance representatives with which the state desired to confer to one. It ultimately is this reduced number which is at the heart of appellees' complaint. And yet, appellees and the lower court have conceded that meet and confer may occur through a representational system. At no time have the appellees quoted authority or even argued that the First Amendment or any other provision of the Constitution dictate the number of representatives which must be established in such a system. Given that PELRA has permissibly established that meet and confer occur between the employer and a single representative, and given that the selection of that representative has occurred on a democratic basis, appellees claim can be seen for what it is: Unhappiness over their failure to be elected by their colleagues. Further, the relief which they desire is revealed as equally unpalatable: A desire to force themselves and their views upon an unwilling majority of faculty members.

B. Compelling Governmental Interests Support PELRA's Meet And Confer System

In the initial brief, appellant labor organizations argued that the substantial governmental interest in promoting labor peace supports PELRA's meet and confer structure. The goal of labor peace has been found to justify collective bargaining by an exclusive representative in both public and private sectors. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The policies found compelling in the context of negotiating terms and conditions of employment are just as persuasive in the meet and confer context.

In response, the appellees dwell upon the provision of PELRA which establishes the meet and confer procedure in order "to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas." Minn. Stat. §179.73 (1982). This provision, viewed in isolation, might arguably support the establishment of meet and confer procedures which do not involve the exclusive representative. However, the meet and confer procedure must be viewed in the context of the overriding goals of the statute: Attaining labor peace through an orderly process which establishes "special rights, responsibilities, procedures and limitations regarding public employment relationships . . ." Minn. Stat. §179.61 (1982). This orderly process in the case of meet and confer is achieved through Minn. Stat. §179.66, subd. 7:

> The employer shall not meet and negotiate or meet and confer with any employee or group of employees who are at the time designated as a member or part of an appropriate employee unit except through the exclusive representative if one is certified for that unit or as provided

> for in section 179.69, subdivision 1, provided that this subdivision shall not be deemed to prevent the communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is a part of the employee's work assignment.

The reasons why this overriding policy supports the meet and confer structure established by PELRA have previously been discussed at length. Summarized, any meet and confer procedure which operates other than through the exclusive representative would undermine the meet and negotiate process, would decrease the effectiveness of faculty input in meet and confer, would result in confusion in the presentation of employee views, and would subject the employer to conflicting demands. Appellees fail to address these contentions.

Appellees argue that knowledge and expertise is not "a peculiar attribute of members of MCCFA." What *is* a peculiar attribute of the MCCFA, however, is its status as the spokesperson for a majority of faculty members. As they have acknowledged, appellees have the right to communicate their ideas and express their views to college administrators on an informal basis. The state has a compelling interest, however, in recognizing an exclusive spokesperson for the faculty, and meeting and conferring with that exclusive representative concerning the overall faculty viewpoint on proposed policy decisions.

C. Even If PELRA's Meet And Confer Procedure Is Unconstitutional, The Lower Court's Ordering Of Cumulative Voting Was Erroneous

Appellees do not argue that the First Amendment directly requires that cumulative voting be used in conducting meet and confer elections. Rather, argue appellees, cumulative voting was a permissible remedy to overcome the "discrimination" of the meet and confer procedure.

Appellees incorrectly perceive this case as one involving lingering effects of whatever constitutional violation may have occurred. This is not a case comparable to, for example, a history of employment discrimination in hiring where a remedy of quotas in hiring is imposed to rectify past discrimination in hiring without ordering the immediate termination of white male employees who unknowingly benefited from the employer's discriminatory conduct. Upon the lower court's order in this case, the entire meet and confer committee was elected in a general election among faculty members. Whatever constitutional violation which existed was extinguished with the replacement of the MCCFA-appointed meet and confer committee with the elected meet and confer committee.[2] If appellees, as they conceded, have no First Amendment right to a system of cumulative voting, then cumulative voting may not be imposed as a remedy. This court has recognized "fundamental limitations on the remedial powers of the federal courts" which include the following proposition: "Those powers could be exercised only on the basis of a violation of

[2] Appellees are again compelled to admit to the reality that the MCCFA enjoys substantial majority-support among the faculty and, therefore, they are unwilling to permit an open democratic selection process serve to determine their representative.

the law and could extend no further than required by the nature and extent of that violation." *General Bldg. Contractors Ass'n. v. Pennsylvania*, 458 U.S. 375 (1982). In this case, the lower court overstepped those fundamental limitations by imposing cumulative voting in its supplemental order.

D. Appellees' Brief In No. 82-977 Fails To Address The Issues As To Which This Court Has Noted Probable Jurisdiction

In their brief in No. 82-977, appellees argue that any system of exclusive representation is constitutionally invalid because it unlawfully delegates governmental sovereignty. This is the same thesis forwarded in the appellees' appeal to this Court in *Knight v. Minnesota Community College Faculty Ass'n.* No. 82-901, as to which the Court summarily affirmed. Appellees' arguments in this regard must be rejected as inconsistent with the Court's affirmation of exclusive representation in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *Perry Education Ass'n v. Perry Local Educators' Ass'n*, —— U.S. ——, 74 L.Ed.2d 794 (1983). For a further discussion of the appellees' contentions, the Court is respectfully referred to the Motion to Affirm of Appellant Labor Organizations in No. 82-901.

Appellees' arguments concerning exclusivity also fail because of the non-binding nature of the meet and confer process. The MCCFA does not enter into a written contract through the meet and confer process which is then binding on the employer and all bargaining unit members. The employer has the obligation to listen and respond in meet and confer, but it retains the total decision-making authority on issues discussed. Thus, whatever the appellees may find objectionable about exclusive

representation in the context of the negotiation of a collective bargaining agreement has no application to the meet and confer process.

CONCLUSION

Based on the foregoing, the appellant labor organizations reiterate the request for relief contained in their Brief on the Merits.

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No. 82-898

IN THE

Supreme Court of the United States

October Term, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

vs.

LEON W. KNIGHT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF OF MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES

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REPLY BRIEF OF MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES

ARGUMENT

I. THE MEET AND CONFER SYSTEM DOES NOT VIOLATE PLAINTIFFS' RIGHT OF EQUAL PROTECTION BECAUSE A FUNDAMENTAL RIGHT IS NOT INVOLVED AND BECAUSE OF THE EXCLUSIVE REPRESENTATIVE'S SPECIAL RESPONSIBILITIES.

The plaintiffs have conceded that they do not have an unfettered right under the First Amendment to require their employer, the Minnesota State Board for Community Colleges (Board), to meet and confer with them. (Brief for the Appellees, Case No. 82-898, p. 5). Moreover, they do not refute the Board's analysis and conclusion that community college instructors are not constitutionally entitled to engage their public employer in a private dialogue.

The plaintiffs have abandoned the district court's First Amendment analysis of this case and have substituted instead an equal protection analysis to justify the district court's decision. They now contend that the Minnesota Public Employment Labor Relations Act as applied by the Board and the Minnesota Community College Faculty Association (MCCFA) discriminates on the basis of associational preference, lacks a rational basis, and serves no compelling state interest. This argument is simply inadequate to rescue the district court's decision.

This Court has previously considered the equal protection argument raised herein by plaintiffs. *Perry Education Association v. Perry Local Educators' Association*, —— U.S. ——, 103 S. Ct. 948 (1983). *See* Brief of Appellant Minnesota State Board for Community Colleges, pp. 24-32. In *Perry*, a faculty union claimed, among other things, that

limiting access to the school district's interschool mail system solely to the faculty's exclusive representative violated the rival union's rights under the Equal Protection Clause of the Fourteenth Amendment. This contention was rejected in *Perry* as it should be here. Because the rival union did not have a First Amendment right of access to the interschool mail system, the grant of such access to the exclusive representative did not violate a fundamental right of the rival union. *Id.* at ——, 103 S. Ct. at 959. Accordingly, the test this Court applied to judge the constitutionality of the access limitation was whether that limitation rationally furthered a legitimate state purpose. *Id.* at ——, 103 S. Ct. at 960. The Court concluded that the special responsibilities imposed on the faculty's exclusive representative was a legitimate state purpose which was rationally furthered by the limitation. As a result, there was no violation of the Equal Protection Clause. *Id.* at ——, 103 S. Ct. at 960.

The plaintiffs' equal protection claim herein fails for the same reasons the rival union's claim failed in *Perry*. As explained in the Board's brief on the merits, restricting meet and confer to the exclusive representative does not infringe any fundamental right of the plaintiffs. Brief of Appellant Minnesota State Board for Community Colleges, pp. 27-35. Participation in meet and confer is not in itself protected by the First Amendment. Accordingly, no fundamental right is implicated justifying stricter review than the rational basis standard applied in *Perry*. The special responsibilities imposed by PELRA on the MCCFA as exclusive representatives are the same as those imposed upon the representative in *Perry*. These special responsibilities are rationally furthered by limiting access to the meet and confer process exclusively to the MCCFA. Therefore, as in

Perry, the requirements of the Equal Protection Clause are satisfied.

The plaintiffs' failure to even mention, much less distinguish, the decision in *Perry* is revealing. The rejection of the rival union's equal protection claim in *Perry* strongly supports the rejection of the plaintiffs' equal protection claim here and a reversal of the district court's decision.

II. THE ISSUE OF AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY IS NOT PROPERLY PRESENT IN THIS CASE AS IT HAS BEEN RAISED AND REJECTED IN CASE NO. 82-901.

Whether PELRA establishes a corporative (or fascist-syndicalist) system of economic-political organization is a question which has been pressed by the plaintiffs in their brief in case number 82-977 which has been consolidated with this case. This issue was raised and decided in this Court's summary affirmance of the district court's decision in case number 82-901. Insofar as it has been repeated in this appeal for the purpose of persuading the Court to reverse its decision in case number 82-901, it is inappropriate.

Plaintiffs' reliance on *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) to support their attack on the meet and confer system is misplaced. The Board respectfully directs the Court to the motions to affirm of the Board and of the Labor Organizations in case number 82-901 for a refutation of the plaintiffs' argument. The system of exclusive representation enacted by the State of Minnesota is essentially indistinguishable from the system upheld by this Court in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The plaintiffs' argument to the contrary is without merit.

CONCLUSION

For the reasons stated, the plaintiffs have failed to establish a basis for sustaining the district court's decision that the meet and confer system as applied is unconstitutional. The district court's decision should be reversed.

Dated: October 21, 1983.

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MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION *et al.*,
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v.

LEON KNIGHT *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Minnesota

MOTION OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF *AMICUS CURIAE*

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IN THE

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LEON KNIGHT *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Minnesota

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MOTION OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS FOR LEAVE TO FILE BRIEF OUT OF TIME

The American Association of University Professors ("AAUP") respectfully moves for leave to file the annexed brief *amicus curiae* in these consolidated cases.

Counsel for all appellants and appellees have consented to the filing of the AAUP's *amicus* brief, and have also authorized us to represent that they have no objection to the extension of time requested in this motion.

A. Interest of Amicus

Founded in 1915, the AAUP is the nation's oldest and largest organization dedicated exclusively to advancing the interests of professors and research scholars in all academic disciplines. The AAUP has approximately 65,000 members in 1300 local chapters on college and university campuses across the country. Since 1972, the AAUP has endorsed and supported efforts by local chapters to engage in collective bargaining activities. Today, approximately sixty chapters are certified as exclusive bargaining representatives and engage in the full range of collective bargaining activities on behalf of faculty members at their institutions.

One of the AAUP's principal tasks, frequently undertaken in collaboration with other higher education organizations, is the formulation of national standards for faculty employment, academic tenure, and the protection of academic freedom. Central among these is the 1940 *Statement of Principles on Academic Freedom and Tenure* prepared jointly by the AAUP and the Association of American Colleges and subsequently endorsed by over one hundred educational organizations and learned societies.[1]

Other AAUP policy statements bear directly on the events that gave rise to the consolidated cases now before the Court. The widely recognized *Statement on Government of Colleges and Universities*, formulated in 1966 by the AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges,[2] describes the respective responsibilities of the fa-

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[1] The 1940 *Statement* and other AAUP policy statements described in this motion and accompanying brief are reprinted in AAUP POLICY DOCUMENTS AND REPORTS (1977), a copy of which has been lodged with the Clerk. This compendium of policy statements is referred to hereinafter as "*AAUP Documents*." The 1940 *Statement* appears on pages 1 to 4.

[2] *AAUP Documents* 40-44. Appellant Minnesota State Board for Community Colleges is a member of the Association of Governing Boards of Universities and Colleges.

culty, the administration, and the trustees in governing an institution of higher education and establishing institutional policy. The AAUP's 1973 *Statement on Collective Bargaining*[3] endorses the formation of faculty unions as an appropriate mechanism for preserving academic freedom and promoting sound academic government.

Federal and state courts throughout the country have applied AAUP policies to resolve disputes over the terms and conditions of faculty employment. The AAUP regularly participates as *amicus curiae* in cases before this Court that implicate matters of AAUP policy.[4]

B. Reasons for Granting the Motion

The primary issue in these cases is the constitutionality of the process for selecting the faculty members of meet-and-confer committees in the Minnesota Community College system. This issue implicates questions of academic institutional governance, which are the subject of AAUP policies. Because the selection process at issue contra-

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[3] *AAUP Documents* 56.

[4] In recent years, the AAUP has participated as *amicus curiae* in this Court in many cases, including Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, *cert. granted*, 51 U.S.L.W. 3287 (U.S. Oct. 12, 1982) (No. 82-52); NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); and City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976). The Court has referred to AAUP policy statements on several occasions in the past. *E.g.*, Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 756 (1976); Board of Regents v. Roth, 408 U.S. 564, 579 n.17 (1972); Tilton v. Richardson, 403 U.S. 672, 681-82 (1971).

The lower federal courts regularly rely on AAUP policies in prescribing rules of conduct in higher education. *E.g.*, Gray v. Board of Higher Education, City of New York, 692 F.2d 901, 907 (2d Cir. 1982) ("[c]ertain AAUP policy statements have assisted the courts in the past in resolving a wide range of educational controversies").

venes AAUP principles and traditions of academic governance, we initially assumed that AAUP's *amicus* brief would be due at the same time as the brief of the appellees in late July.

The AAUP's potential *amicus* participation was widely discussed at the AAUP's Annual Meeting on June 18. Thereafter, the decision was made to file an informational brief *amicus curiae* setting forth the Association's policy positions and supporting neither appellants nor appellees on the ultimate question of affirming or reversing the decision of the court below.

Although the AAUP's brief was substantially written, the decisions made on June 18 required revisions and further internal consultation. Printing the brief took several additional days. For these reasons, the AAUP was unable to submit its brief at the time the appellants' briefs were due (June 20), and is filing this motion and its brief seven days thereafter.[5]

The AAUP believes that an extension will not prejudice any party. The appellees, who have consented to the extension, will have sufficient time to respond as appropriate to the points contained in the AAUP's *amicus* brief.

We also believe that the brief may be useful to the Court and parties in illuminating some of the observations on university governance and collective bargaining expressed in the decision of the three-judge district court.

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[5] It is not clear to the AAUP that this motion is necessary. It is filed as a precautionary measure. With respect to the single issue addressed in our *amicus* brief, the AAUP takes a position inconsistent with the Minnesota statute invalidated by the court below and defended by the appellants in this Court. Nevertheless, because we do not address the constitutional issues before the Court and support neither party on the ultimate issue of affirmance or reversal, we have filed this motion in the event that Rule 36.2 is construed to require the filing of our *amicus* brief within the time allotted to the appellants for filing their briefs.

The lower court decision described what it termed the "longstanding tradition of faculty participation in college goverance," and addressed novel questions on the relationship between traditional forms of governance and new alternatives contained in collective bargaining agreements. As an organization that formulates widely followed national standards on these subjects and includes in its membership more than 35,000 faculty members who engage in collective bargaining, the AAUP is uniquely situated to speak to the questions now before the Court.

CONCLUSION

For the foregoing reasons, the AAUP respectfully requests that its motion for leave to file the annexed *amicus* brief be granted.

Respectfully submitted,

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---

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS *AMICUS CURIAE*

This brief is filed, with the consent of all parties, by the American Association of University Professors ("AAUP"), *amicus curiae*.

INTEREST OF AMICUS CURIAE

The interest of the AAUP is described in the accompanying motion for leave to file this brief *amicus curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ruling of the three-judge court below was predicated in large measure on assumptions about the manner in which institutions of higher education are governed and the relationship between traditional forms of faculty participation in academic policy making and newer forms involving collective bargaining. This *amicus* brief attempts to develop more fully this aspect of the lower court's decision. The AAUP does not address the constitutional issues raised by this appeal and supports neither affirmance nor reversal of the court's ruling. We seek rather to inform the Court, from our vantage point as an educational organization with two-thirds of a century of experience in academic policymaking, about considerations implicit in the lower court's opinion that may be relevant to the final disposition of these cases.

The strong American tradition of faculty participation in setting educational policy is reflected in the AAUP's 1966 *Statement on Government of Colleges and Universities*, which endorses the concept of a forum for the presentation of the views of the whole faculty. The AAUP's 1973 *Statement on Collective Bargaining* approves of unionization as a mechanism for advancing faculty interests, and also urges a faculty collective bargaining representative to establish democratic structures within the institution providing full participation by all faculty. This brief will examine in some detail the considerations underlying these policy positions.

In Part I of the Argument, we show that faculty members acting through collective governance mechanisms should have primary decisionmaking responsibility in areas relating to educational policy. In Part II, we show that collective bargaining is entirely consistent with traditional forms of academic governance with respect to the faculty's role in educational policymaking. Finally, in Part III, we describe briefly the conclusions reached in 1977, when the AAUP's Standing Committee on College

and University Government examined related developments in the Minnesota State University System.

To comport with normative academic practice as embodied in AAUP policy statements, an institutional forum should exist for the expression and consideration of the views of all faculty members on matters of educational policy. A system of collective bargaining in which the certified agent negotiates on the terms and conditions of employment is not inconsistent with academic practice or AAUP principles. Intimating no views on the constitutional questions before the Court, we urge only that the Court's disposition of these cases be consistent with these principles.

ARGUMENT

AS A MATTER OF SOUND ACADEMIC PRACTICE, FACULTY PARTICIPATION IN THE FORMULATION OF EDUCATIONAL POLICIES SHOULD NOT BE CONDITIONED ON MEMBERSHIP IN A FACULTY UNION.

I. The Nature of Faculty Service to the Institution

Reflecting the experience of the German university in the nineteenth century,[1] American higher education has fostered the concept of faculty influence on the governance of the institution.[2] The model allocation of responsibility

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[1] The abundant literature on the structural origins of the modern American university is cited and well described in Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 822-29 (1983). For a fuller exploration of the same ground, *see* R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 209-407 (1955); Metzger, *The German Contribution to the American Theory of Academic Freedom*, 41 AM. ASS'N UNIV. PROFESSORS BULL. 124 (1955).

[2] On October 26, 1876 Benjamin Rush, an early trustee of Dickinson College in Pennsylvania, is reported to have written to his fellow trustees: "When our professors cease to be qualified to share in the power of the College, it will be proper to dismiss them, for

places in the hands of the faculty, acting collectively, primary responsibility over education policymaking in such areas as curriculum, methods of instruction, the conduct of academic research, and faculty appointments and promotions. The tradition of faculty control in these and related areas is based on the premise that faculty members can bring collective expertise to bear in shaping the educational mission of the institution, with expression of the range of faculty views assisting in the search for truth.[3]

"The university," an eminent scholar has noted, "differs radically from most other types of organizations, such as governments, business enterprises, or armies, because of the particular purposes of the academic institution."[4] Universities exist to teach students and to advance human learning, tasks that involve intimate relationships between teacher and student on the one hand, teacher and subject-matter on the other.

The implications for university government are clear and immediate. Universities are not governed as other institutions traditionally are:

> . . . The people "on top" in an academic institution are not necessarily the trustees, the president, or the deans, but in many situations the professor-teachers in their lecture halls and seminars or the professor-researchers in their studies and laboratories. Decision-making in the university must involve the teacher-researcher "on the assembly line" because he

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government and instruction are inseparably connected." J. Corson, GOVERNANCE OF COLLEGES AND UNIVERSITIES 97 (1960). See M. Ross, THE UNIVERSITY: THE ANATOMY OF ACADEME 159 (1976).

[3] *See* T. HUNGATE, MANAGEMENT IN HIGHER EDUCATION 66-67 (1964): "The [university's governing] board, in fulfilling its responsibility for management, requires the aid of the faculty . . . in part because the task is too big to be carried out unaided, but more especially because the board does not, unaided, possess the best judgment on all matters involved."

[4] H. Mason, COLLEGE AND UNIVERSITY GOVERNMENT 1 (1972).

> chiefly knows intimately what the "production" of the university is all about; it is his immediate proximity to the personal tensions of learning and scholarly creation which gives legitimacy to much of the decision-making for the academic community.[5]

Shared authority is integral to the concept of an effective university because "the variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence" among components of the institution.[6]

The faculty's authority in matters of educational policy creates a corresponding obligation on the part of individual faculty members to participate in institutional governance—an obligation that is both an ethical canon of the profession and a common criterion for promotion and tenure. Service on institutional or departmental faculty committees is a stated requirement at many institutions. Such service is emphasized in the AAUP's *Statement on Professional Ethics*, which has been adopted at many institutions: "As a colleague, the professor has obligations that derive from common membership in the community of scholars . . . . He accepts his share of faculty responsibilities for the governance of his institution."[7] The ethical obligation is supported by a practical corollary. Factors such as "institutional service" or "campus committee work" are commonly considered, along with teaching and research, in decisions on faculty promotion, tenure, and salary increases.[8] At junior colleges, in fact,

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[5] *Id.*

[6] *Id.* xiii.

[7] *AAUP Documents* 65-66.

[8] At one state-supported institution, for example, faculty members are evaluated for reappointment and promotion on the basis of three criteria: teaching effort and effectiveness, scholarly activity, and "service to the department, the University, [and] the community." Department of Sociology Personnel Policy, Univer-

institutional service may be more important to the career of a faculty member than at four-year institutions where the opportunity for research is correspondingly greater.[9]

In Minnesota, the role of faculty members in institutional goverance is obliquely acknowledged under the Minnesota Public Employment Labor Relations Act,[10] which ascribes to the statutorily-created "meet and confer" committees a purpose and justification consistent with traditional notions of academic governance:

> . . . professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies.

Minn. Stat. § 179.73, subd. 1. As the court below observed, the work performed by community college faculty members in Minnesota who serve on institutional meet-and confer committees is "integral to the profes-

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sity of Delaware, *quoted and discussed in* Scott v. Univ. of Delaware, 601 F.2d 76, 79 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979). Criteria similar to these are commonly used at American universities. *See, e.g.*, Clark v. Whiting, 607 F.2d 634, 636-7 (4th Cir. 1979); Carr v. Board of Trustees of the University of Akron, 465 F. Supp. 886, 891, 893 (N.D. Ohio 1979), *aff'd mem.*, 663 F.2d 1070 (6th Cir. 1981); Kunda v. Muhlenberg College, 463 F. Supp. 294, 301 (E.D.Pa. 1978), *aff'd*, 621 F.2d 532 (3rd Cir. 1980); Tyler v. College of William and Mary, 429 F. Supp. 29, 30 (E.D. Va. 1977); Pace College v. Commission on Human Rights, 38 N.Y.2d 28, 34, 339 N.E.2d 880, 882, 337 N.Y.S.2d 471, 474 (1975).

[9] See Gustad, *Policies and Practices in Faculty Evaluation*, 42 EDUC. REC. 194, 200, Table 3 (1961); Astin & Lee, *Current Practices in the Evaluation and Training of College Teachers*, 47 EDUC. REC. 361, 369, Table 4 (1966) (campus committee work considered of "major importance" in 32% of liberal arts colleges and in 41% of junior colleges).

[10] 1971 Minn. Laws ch. 33, Minn. Stat. § 179.61 *et seq.* (1980) (hereinafter the "Act" or the "Minnesota Act").

sional function of a college professor." App. 24.[11] We respectfully submit that this conclusion of the court below is unassailable as a matter of tradition and sound academic policy. So is the corollary that flows from it: a faculty member who, on the basis of nonacademic criteria, is excluded from the process by which the faculty exercises its educational policymaking authority is being deprived of an essential attribute of faculty status.

II. The Relationship Between Faculty Collective Bargaining and Institutional Governance

Collective bargaining by faculty members in higher education is a development of the last fifteen years, but even in that short time it has proved its effectiveness in advancing faculty interests.[12] In 1973, the AAUP expressly endorsed collective bargaining for teachers, researchers, and other professional higher education em-

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[11] As used herein, the abbreviation "App." refers to the Appendix to the Jurisdictional Statement filed November 30, 1982, by the appellants in No. 82-898.

[12] M. Baratz, *Shared Authority and Collective Bargaining*, 59 EDUC. REC. 193 (1978). Statistics compiled by Joseph Garbarino, Director of the Faculty Unionism Project at the University of California at Berkeley, show that the number of unionized faculty members at four-year institutions of higher education grew from 3,300 in 1968 to almost 67,000 in 1975. Over the same seven-year period, the number of unionized faculty members at two-year institutions increased from 11,000 to 35,000. J. W. Garbarino, *Faculty Union Activity in Higher Education—1975*, 15 IND. RELATIONS 119 (1976).

Professor Robert Gorman, past president of the AAUP and a nationally respected expert on labor relations, observed in 1982 that "collective bargaining represents a form of university governance in which the faculty shapes the regulations that govern the institution in personnel matters and in educational matters .... Collective bargaining has indeed vindicated the expectation of our membership . . . that it would be a constructive method for promoting the objectives of our Association." *The AAUP and Collective Bargaining: A Look Backword and Ahead*, 68 ACADEME 1a, 1a-3a (1982).

ployees in its *Statement on Collective Bargaining*. Through collective bargaining, the faculty not only can strengthen its collective ability to influence the distribution of an institution's economic resources, but also can work to enhance academic freedom and tenure, due process, and sound academic governance. The *Statement on Collective Bargaining* encourages the faculty representative to foster within the institution structures of governance that provide full participation by the faculty.

Models of institutional structure are described more fully in the *Statement on Government of Colleges and Universities*. Under the *Statement on Government*, the faculty acts in the first instance on all matters of educational policy:

> The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. . . . The faculty sets the requirements for the degrees offered in course, determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved.
>
> Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy.[13]

The lower court's decision indicates that subjects within the purview of the meet-and-confer committees include some matters of primary faculty responsibility, such as "new course proposals and other curriculum matters, . . . student rights and student affairs generally, . . .

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[13] *AAUP Documents* 43.

academic accreditation of the community colleges, and other matters." App. 49.

After identifying areas of primary faculty responsibility, the *Statement on Government* describes the governing mechanisms that safeguard the faculty's authority in those areas:

> Agencies for faculty participation in the government of the college or university should be established at each level where faculty responsibility is present. An agency should exist for presenting *the views of the whole faculty* . . . .
>
> The agencies may consist of meetings of all faculty members of a department, school, college, division, or university system, or may take the form of faculty-elected executive committees in departments and schools and a faculty-elected senate or council for larger divisions or the institution as a whole.[14]

As the court below observed, the meet-and-confer provision in the Minnesota Act was intended to "codif[y] a longstanding tradition of faculty participation in college governance." App. 18. The meet-and-confer committees replace "faculty senates . . . selected through elections in which every faculty member was eligible to both vote and seek election." *Id.* 20. The decision of the lower court makes it clear that faculty members who were excluded from the selection process for the meet-and-confer committees were effectively excluded from the process through which "official" faculty concerns and views were expressed. App. 20, 51. It is inconsistent with sound principles of academic collective bargaining to condition faculty participation in the formulation of educational policies on membership in a faculty union. To the extent that this has occurred in higher education in Minnesota, AAUP policies are violated.

We must, however, express an important qualification. There is a critical analytic distinction, recognized by the

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[14] *Id.* 43-44 (emphasis added).

Minnesota Act, between subjects that relate to the terms and conditions of employment, such as wages, hours, and working conditions, and subjects that relate to academic policy, such as curriculum, admission, and student degree requirements. Under the Act, the former subjects come under the jurisdiction of "meet and negotiate" committees. Under the AAUP's policies as consistently interpreted and in accordance with common institutional practice, the certified bargaining agent has the right to exclude nonunion members from serving on meet-and-negotiate committees; that practice was not challenged in the court below and would not be prohibited by the holding or the reasoning of that court. Thus, the Act draws an important distinction between negotiating and conferring. The AAUP does not in this brief take a position on the correctness of the allocation of specific subjects between the meet-and-confer process and the collective bargaining process under Minnesota law. We do submit, however, that those subjects properly within "primary faculty responsibility" should be open to participation and conferring by all faculty members.[15]

III. The Application of AAUP Standards to the Governance Structures Established in Public Higher Education Under Minnesota Law

In 1977, the AAUP had occasion to examine the application of its governance and collective bargaining precepts to public-sector higher education in Minnesota. After the Minnesota Act became law in 1971, a collective bargaining agent representing faculty members at six publicly-operated state institutions negotiated a collective bargaining agreement with the trustees of the Minnesota

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[15] The lower court ordered cumulative voting for the future selection of faculty representatives to the meet-and-confer committees. *See* Appellant's Motion to Expand the Record and Add an Issue, April 28, 1983. The *Statement on Government of Colleges and Universities* contemplates, in contrast, that methods for selecting faculty participants should be designed by the faculty.

State University System. At the direction of the bargaining agent, various faculty committees on curriculum, graduate education, learning resources, and other subjects were dissolved. Simultaneously, the functions performed by these committees were transferred to newly-constituted committees operating under the aegis of the bargaining agent. Appointments to the new committees were restricted to union members. In a subsequent report, the AAUP's Standing Committee on College and University Government concluded that the new arrangement violated traditional standards of institutional governance:

> We view this restrictive practice as inimical to sound principles of academic government and of collective bargaining at an academic institution. . . . [S]ince service on faculty committees is often one of the criteria for retention, promotion, or tenure, conditioning eligibility for committee service on union membership is a potential threat to academic freedom and unfairly discriminates against faculty members who wish to exercise their right not to join the faculty's union.[16]

The cases now before the Court challenge the same restriction established pursuant to the same state statute. While taking no position on the constitutionality of the practice, the AAUP believes that, as a matter of sound academic policy, all faculty should have an opportunity to participate in the selection of meet-and-confer committees in the Minnesota Community College System. Without an open selection process, the committees cannot be said to provide a forum for the expression of the views of the entire faculty on matters of educational policy. Equal access to that forum is essential if the views of the entire faculty are to be heeded on subjects at the core of the education enterprise.

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[16] "Committee T Objects to Practices at Minnesota State Universities," 11 ACADEME 8 (June, 1977).

CONCLUSION

For the reasons set forth above, we respectfully urge the Court to be guided by two widely honored precepts of academic policy. First, a system of collective bargaining where the bargaining agent negotiates on terms and conditions of employment is not inconsistent with academic practice or AAUP principles. Second, to comport with normative academic practice as embodied in AAUP principles, faculty participation in the process for establishing educational policies should not be conditioned on the academically irrelevant criterion of union membership.

Respectfully submitted,

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Nos. 82-898, 82-977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,
Appellants,
and
MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION,
MINNESOTA EDUCATION ASSOCIATION, and
NATIONAL EDUCATION ASSOCIATION, *et al.*,
Appellants,
v.
LEON W. KNIGHT, *et al.*,
Appellees.

On Appeal From The United States District Court, District of Minnesota, Fourth Division

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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District of Minnesota, Fourth Division**

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

The American Federation of Labor and Congress of Industrial Organiaztions ("AFL-CIO"), a federation of 99 national and international unions with a total membership of approximately 14 million working men and women, file this brief *amicus curiae* with the consent of the parties pursuant to the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The portion of the opinion below at issue in this Court begins from the proposition that if a state establishes a formal system for conferring with selected members of a state college faculty on matters of college goverance, the right of free speech of the faculty members who are not consulted is impaired. Jurisdictional Statement Appendix No. 82-898 ("Jur. St. App."), at A-20 to A-23. Both sets of appellants respond that the First Amendment provides no individual citizen, nor any government employee, any right to be directly consulted by governmental authorities on matters of governmental policy. With that proposition we are in complete agreement, as we have earlier had occasion to inform this Court. *See* Brief *amicus curiae* for American Federation of Labor and Congress of Industrial Relations in *Madison School District v. Wisconsin Employment Relations Commission*, No. 75-946; *id.*, 429 U.S. 167, 179, n. * (Brennan, J., concurring). Because the appellants in this case are ably demonstrating that this underlying premise of the district court opinion is contrary to the First Amendment law in this Court (*see Perry Education Association v. Perry Local Educators Associations*, —— U.S. ——, 51 L.W. 4165 (Feb. 25, 1983)), we do not address further this aspect of the case.

The district court, however, identified an additional First Amendment interest supposedly impaired by the Minnesota statutory scheme here under attack. The Minnesota Community College Faculty Association ("MCCFA"), the designated representative of community college faculty members for purposes of both bargaining over terms and conditions of employment and meeting and conferring on matters of college governance, chose the individuals who met with the college administrators, and, as a matter of practice, appointed only its own members to these meet and confer committees. The district court held that permitting an organization selected by a majority of the affected faculty (Minn. Stat. 179.67; Jur. St. App., at A-91 to A-95) to determine in this manner who will have

the opportunity formally to discuss academic policy questions with the college administrators "infringes the First Amendment associational rights of faculty members who do not desire to join the MCCFA." Jur. St. App. at A-24.[1] The notion, it appears, is that because the opportunity to participate in the selection of, and to serve on the meet and confer committees is "viewed by some [faulty members] as essential to their role on the faculty" (Jur. St. App. at A-51, ¶ IV(A)(5)), faculty members who would not otherwise do so may decide to join MCCFA. The district court thought it "self evident that one's freedom not to join [MCCFA] . . . is seriously impaired" by this "inducement" to associate with MCCFA.

In its Order of April 5, 1983, the district court went even further in perceiving impairment of a constitutional interest in refusing to associate with a private organization. Under that court's original order, all faculty members were permitted to vote for individuals to serve on meet and confer committees. The MCCFA, however, endorsed a slate of candidates. Because the MCCFA did, after all, have the support of more than half the faculty, its slate was chosen. The district court in its April, 1983 Order maintained that this selection procedure as well, although open to all employees, violated the "First Amendment right[] to . . . association" of nonmembers. Again, the district court's point, as we understand it, is that because membership in MCCFA was, under the election rules used, decisive as a practical matter with regard to direct participation in the meet and confer process, there is an "infringement" of the "freedom not to join" MCCFA.

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[1] The "meet and confer" opportunity is in no way in derogation of any individual faculty member's rights to "communicate . . . [his or her] individual views to administrators." Jur. St. App. at A-50, ¶ III(B)(8); *see also* Minn. Stat. § 179.65, Subd. 1; Minn. Stat. § 179.66 Subd. 7, Minn. Laws 1982, ch. 568, § 2.

It may well be that the district court's "right of non-association" analysis is merely the ultimate extention of its basic misconception regarding the First Amendment implications of selective consultation by governmental entities: If in fact college faculty members had a constitutionally cognizable right to discuss academic policy matters with college administrators, it is possible that limiting the exercise of that right to members of a certain private organiaztion could, absent a compelling overriding justification, run afoul of the constitution. *See Carey v. Brown*, 447 U.S. 455; *Madison School District, supra.* On this view, a determination that there is no constitutional right of access to the offices of college officials for the purpose of compelling discussion on matters of academic policy would determine as well that the officials may, as long as their choice is rationally based, prefer for consultation purposes one organization over another, or over disparate individuals, as readily as those officials might choose one individual over another individual. *Perry Education Association, supra*; *City of Charlotte v. Firefighters*, 426 U.S. 283; *Babbitt v. United Farm Workers*, 442 U.S. 289.

On the other hand, the district court may have viewed the supposed impairment of a constitutionally-based right to refuse to join a private organization as independent of any First Amendment protection of the opportunity to discuss academic policy matters with government officials. On this approach, the critical factor would be that access to an attractive government-conferred privilege or benefit depended upon membership in a particular organization; that the benefit happened to be the opportunity to participate in policy discussions would be immaterial. It is to the latter, limited thesis that this brief is directed.

As we show in Part I of the Argument, *infra*, the viability of this aspect of the district court's decision

turns in the first instance upon the nature and strength of the asserted constitutional interest in non-association. While this Court has often affirmed that First Amendment protections include the right to associate with others for the purpose of advancing ideas, the Court has devoted limited attention to the constitutional protection to be accorded the opportunity to remain isolated from such associational activity. As a general matter, however, this Court has implied from affirmative constitutional rights an obverse right only where the policies underlying the Constitution's protection of the affirmative right justify such a result. Thus, the nature of the constitutional protections accorded the interest in nonassociation cannot be discovered by the simplistic strategem of turning inside out the First Amendment's protection of the affirmative right to associate for the advancement of one's political or other views, or by simply applying in a mechanistic way First Amendment precepts developed in that context. As we go on to demonstrate, the primary interest forwarded by the nonassociational right concept is that relating not to the public interchange of ideas forwarded by the protection of associational rights but to the private interest of individuals in their personal integrity and personal beliefs; indeed, there is a tension between the First Amendment policy of enhancing the public dialogue and an asserted right to isolate oneself from expressive activity by others.

In Part II of the Argument, *infra*, we explore the nonassociational rights claim here in the light of the general points stated in Part I. We explain that in this instance the government, though not compelled to do so by the Constitution, by agreeing to listen to what a particular group wishes to discuss has enhanced both the public dialogue and the associational interests of those who are members of the group. The claim here is that the government may not do so because its actions create an inducement to nonmembers who wish to participate in the discussions to join the group. To recognize a

constitutionally-protected right of nonmembers to curb the ability of government in this manner would be to read the Constitution as erecting a *cordon sanitaire* between the government and private associations of its citizens that would stiltify the government's ability to consult with private associations and to increase—through favorable tax treatment, grants and contracts—the ability of such associations to carry out socially-desirable activity. These deleterious effects on the proper workings of the government in a democratic socieyt are themselves sufficient to require rejection of the nonassociational rights claim in this case. Moreover, this Court in *Regan v. Taxation With Representation*, —— U.S. ——, 51 L.W. 4583 (May 23, 1983), recently rejected in the context of claims resting on the affirmative right of free speech a contention analytically indistinguishable from the district court's ruling here. The Court held that there is no infringement of First Amendment rights where the government treats expression by one group favorably, but not speech by another group. As we show, under the approach taken in *Regan*, the interest in nonassociation here asserted, when examined in light of the freedom of belief value which underlies that interest, can certainly fare no better.

ARGUMENT

I

A. (1) This Court has long recognized, and recently several times reaffirmed, that a right to associate with others for purposes of expressive activity inheres in the First Amendment protections of free speech, free press, and free assembly:

> As we so recently acknowledged in *Citizens Against Rent Control v. Berkeley*, —— U.S. ——, ——, 102 S.Ct. 434, 436, 70 L.Ed.2d 492, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." We recognized that "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Ibid.* In emphasizing "the important of freedom of association in guaranteeing the right of people to make their voices heard on public issues," *ibid.*, we noted the words of Justice Harlan, writing for the Court in *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488:
>
> > "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."
>
> [*N.A.A.C.P. v. Claiborne Hardware Co.*, —— U.S. ——, 102 S.Ct. 3409, 3423.[2]]

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[2] As a derivative of the express First Amendment rights, the right of free association does not encompass *all* forms or organization or affiliation; only association for purposes of fostering expressive activity is protected. For example, while

> parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desireable, and . . .the children have an equal right to attend such institutions . . . it does not follow that the *practice* of excluding racial minorities from such institutions is also

Thus, because "[t]he Court has long viewed the First Amendment as protecting a market place for the clash of different views and conflicting ideas" (*Citizens Against Rent Control v. City of Berkeley*, —— U.S. ——, 102 S.Ct. 434, 436), the Court has long recognized as well the right of individuals to join together more effectively to compete in that "market place."

(2) The scope of any constitutional right to *refuse* to associate with other individuals in an organization devoted in whole or part to expressive activity is much less developed.[3] The few cases are those concerning union security clauses. *Railway Employees v. Hanson*, 351 U.S. 225 (requiring association through payment of fees by employees to a union that is the employees' exclusive representative does not infringe First Amendment rights); *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-235 (expenditure by an exclusive representative of exacted

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protected by the same principle. [*Runyon v. McCrary*, 427 U.S. 160, 176.]

See generally L. Tribe, *American Constitutional Law*, at 702 (1978).

[3] It is important to distinguish the "right of non-association" the district court relied on here from superficially similar situations in which exercise of the affirmative right to associate leads to adverse action against the person exercising that right. For example, in *Elrod v. Burns*, 427 U.S. 347, 355-56, the plurality held that requiring adherence to one political party in order to retain one's job meant that

> [a]n individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk . . . .

Thus, insofar as *Elrod* is premised on associational rights, that decision involved protection of affirmative rights and not the purely negative right to refrain from associating at all. See Gaebler, *First Amendment Protection Against Compelled Expression and Association*, 23 Boston Coll. L. Rev. 995, 996 n. 4 (1982). See also *Branti v. Finkel*, 445 U.S. 507, 514-516 (*Elrod* also based simply on protecting right to one's own "private political beliefs").

fees on political issues unrelated to collective bargaining interferes with objecting employees' First Amendment rights). *See also Lathrop v. Donohue*, 367 U.S. 820 (plurality opinion) (to require lawyers to pay fees to, but not otherwise to participate in, an organization which is involved in some legislative activity but whose "activities without apparent political coloration are many" (*id.* at 839) does not constitute "any impingement upon protected rights of association" (*id.* at 843)); *see also id.*, at 849 (opinion of Harlan & Frankfurter, JJ.) (agreeing with above, but going on to find no infringement even as to political expenditures); *but see Abood*, *supra*, 431 U.S., at 234 n.29 (*Lathrop* settled no constitutional question).

In none of these cases was the nature or breadth of the right to refrain from association explored in any depth, but this much is clear: the asserted right to refuse to associate is not entitled to the full measure of solicitude reserved for core First Amendment rights.[4] In *Hanson*, for example, the Court stated that the requirement financially to support the incumbent labor organization is one as to which "[t]he task of the judiciary ends

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[4] As this Court has recognized that expressive activity formerly believed to be outside the First Amendment's protections does in certain circumstances implicate the policies underlying the system of free expression, the Court has at the same time adjusted the applicable doctrinal rules to accurately reflect those aspects of First Amendment values in fact implicated so as to permit the government more easily to justify impairment of these less-central aspects of expression. *See, e.g., Young v. American Mini Theatres*, 427 U.S. 50, 70 (plurality opinion); *see also id.*, at 77 (Powell, J., concurring); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563-564 (because "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising" the government may "ban forms of communication more likely to deceive the public than inform it . . . or commercial speech related to illegal activity" and need not show as strong a governmental interest to sustantiate regulation of other forms of commercial speech); *compare Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 with *In re Primus*, 436 U.S. 412.

once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises" (351 U.S., at 234); and in *Abood*, the Court reaffirmed its *Hanson* holding and deferential approach, despite recognition that First Amendment interests were implicated (431 U.S., at 222-223) and protests in the dissent that the nonassociational interests asserted were not accorded full First Amendment protection (*id.* at 254-55) (dissenting opinion).

Moreover, even as to the First Amendment protection accorded the right to refrain from expressive activity generally, there is relatively little doctrinal development in this Court. Again, the few cases make clear simply: (i) that there are indeed situations in which impairment of an individual's right to refrain from expressive activity so sharply conflicts with the First Amendment value of protecting freedom of belief and of personal integrity as to invalidate the complained of governmental action (*West Virginia Board of Education v. Barnette*, 319 U.S. 624; *Wooley v. Maynard*, 430 U.S. 705); but (ii) that the First Amendment protection accorded the right to refrain from government compelled expression is not simply the mirror image of the right to speak, and may not pertain in circumstances in which affirmative speech would be fully protected (*Pruneyard Shopping Center v. Robins*, 447 U.S. 74). In *Pruneyard* the Court held that no First Amendment rights of a shopping center owner are infringed by requiring him to allow his property to be used by individuals engaged in communicative activity. If, instead, the state had attempted to *forbid* the shopping center owner from allowing the use of his property by others for political speech activity and thereby supporting their message, there would be no doubt that the owner's First Amendment rights would have been infringed. *Buckley v. Valeo*, 424 U.S. 1; *First National Bank of Boston v. Bellotti*, 435 U.S. 768.

B. While this Court has not had the occasion to explore at any length the appropriate relationship between

the constitutional protection accorded association and the protection accorded a refusal to associate, the Court has in other circumstances made clear that constitutional rights are not to be mechanically read as invariably implying their obverse:

> *The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.* For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States v. Kobli*, 172 F.2d 919, 924 (C.A.3d Cir. 1949) (by implication); although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case in another district, see *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245; *Kersten v. United States*, 161 F.2d 337, 339 (C.A. 10th Cir. 1947), cert. denied, 331 U.S. 851; and although he can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation. [*Singer v. United States*, 380 U.S. 24, 34-35; emphasis added.[5]]

So when the Court, "follow[ing] the approach of *Singer*," determined that the Sixth Amendment's right to counsel guarantee is to be read as providing the right to proceed *pro se*, the Court stressed that "[t]he inference of rights is not a mechanical exercise" and such an "implied right must arise independently from the design and history of the constitutional text". *Faretta v. California*, 422 U.S. 806, 820 n.15.

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[5] *Singer* held that the Sixth Amendment right to trial by jury does not establish a right to a judge trial. One additional example comes readily to mind: The right to be free of cruel and unusual punishment does not imply a mirror-image right to incur cruel and unusual punishment on demand.

In this instance, the constitutional text is of little affirmative aid, since the right of association is itself implied rather than express. The principal "design" of the constitutional protection accorded free association is, however, as we have noted, clear from this Court's cases: By joining together, individuals are able to enhance the strength of their own voices, particularly as to governmental matters, and thereby to foster the free exchange of ideas the First Amendment is itself designed to foster. *Citizens Against Rent Control, supra*; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460. *See also New York Times v. Sullivan*, 376 U.S. 254, 269-70.

A supposed "right" to remain isolated from the expressive activity of others, or not to communicate at all, is wholly divorced from this central First Amendment interest. An individual who refuses to express his or her views, or to associate with others for the purpose of communicating views, is quite obviously not enhancing the full discussion of matters of public concern which it is a primary purpose of the First Amendment to promote.

Furthermore, in situations like the instant one, there is no sense in which the government's intervention imposes an official orthodoxy. Instead, the opportunity for meaningful exchange of ideas, and therefore for attaining the ideas of the First Amendment, is enhanced. *Compare West Virginia Board of Education v. Barnette, supra, with Pruneyard Shopping Center, supra.*

Here, for example, the MCCFA's position on academic policy matters is formulated by its members, not by the college administrators, and MCCFA's meet and confer representatives were, originally, chosen by the organization's members. Thus, if a nonmember does decide to join MCCFA in order to have a voice in the meet and confer process, he will, by doing so, in no way contract the public dialogue on the issues involved in academic governance. While the group may ultimately support a position with

which a dissenter disagrees, the dissenter will have the prior opportunity, within the group, to express his or her views, and the subsequent opportunity publicly to argue against the decision reached by the majority of the organization's membership.

It is, of course, true that an individual may object to the fact that through association, ideas opposed to his own may ultimately be magnified in volume and importance. But, as a general matter, the First Amendment does not countenance silencing or quieting some in order to enhance the relative voice of others. "[T]his concept contradicts basis tenets of First Amendment jurisprudence." *First National Bank of Boston v. Bellotti*, *supra*, 435 U.S., at 791 n.30. That is why, for example, this Court refused to approve a state statute providing a "right-of-reply" (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241), and invalidated as well federal limitations on the campaign expenditures of individuals (*Buckley v. Valeo*, *supra*, 424 U.S., at 49).

In sum, governmental action that impares the ability of individuals to remain isolated from the expressive activity of others does not impair the "marketplace of ideas" which the right of free association primarily fosters. This does not, however, end the matter. The First Amendment protects not only speech and association as such, but " the broader concept of individual freedom of mind." *Wooley v. Maynard*, *supra*, 430 U.S., at 714. In those few instances in which this Court has protected the right to refrain from expressive activity, the reason has been that the government has invaded "the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control." *West Virginia Board of Education v. Barnette*, *supra*, 319 U.S., at 642; *see also Abood v. Detroit Board of Education*, *supra*, 431 U.S., at 234-235; *Elrod v. Burns*, *supra*, 427 U.S., at 356-57. We turn now to a consideration of those cases.

II.

A. It is well at this juncture to recall the context in which this case arises: Minnesota has not compelled any faculty member to become a member of MCCFA. The state has decided, however, that because MCCFA represents a majority of the faculty members, state college administrators are to consult with representatives chosen by MCCFA to hear the latter's views on academic policy matters. Clearly, the overall thrust of this scheme is to create an opportunity, that the state need not provide, for discussion of academic policy matters and, thus, to enhance such discussion. This forwards the major policy concerns underlying the First Amendment's protection of the right freely to associate with others for the expression of views.

It is claimed, however, that by its very determination to respect the decision of the majority of faculty members to associate together the government has impermissibly burdened the nonmembers' decision to remain unaffiliated. Thus, the nonmembers' complaint is that the government has made association more attractive than nonassociation by determining to hear out the enhanced, organized voice of the majority of faculty members. In effect, their argument is that the Constitution, to protect the interest in nonassociation, requires the erection of a *cordon sanitaire* preventing the government from dealing with organizations rather than individuals, or one organization rather than another.

The distortions of the proper workings of the government in a democracy entailed by this argument are sufficient to demonstrate that the First Amendment contains no such doctrine. For example, governmental entities seeking information or counsel on matters before them for decision would be precluded from seeking the views of leaders of major organizations whose members' interests are affected, unless all interested unaffiliated individuals are consulted as well. On the same reasoning, it could become unconstitutional to provide subsidies through the tax system to nonprofit organizations (*see, e.g.*, 26 U.S.C.

§ 501(c)(3)), or to provide governmental grants to certain nonprofit organizations of various types but not to others, or to organizations but not to individuals (*see, e.g.*, 42 U.S.C. §§ 2996e, f(c)).

In a society which has been, from de Tocqueville's day to ours, infused with the energies of private organizations, the theory that the government may not have any dealings with organized groups of its citizens where unaffiliated individuals protest is unworthy of serious consideration. The effect of erecting such a barrier between the government and private organizations would be to read into the free speech clauses of the First Amendment an analogy to the neutrality requirement of the religion clauses. But this Court has expressly held this analogy to be "patently inapplicable" (*Buckley v. Valeo, supra*, 424 U.S., at 92), and therefore upheld public support for some but not all political parties as an "effort . . . not to abridge, restrict, or censor speech, but rather to use public money to facilitate an enlarged public discussion [and therefore to] further [] First Amendment values (*id.*; see also *Storer v. Brown*, 415 U.S. 724).

Indeed, the district court's April 5, 1983 order, which was entered to effectuate its basic decision, provides a vivid demonstration of how its over-blown nonassociation theory tends to destroy not only the government's ability to operate in a rational manner in its consultative activities and in allocating other benefits but also the true right of association as stated by this Court. That order conditions the government's beneficial dealings with private organizations on opening up the association's internal decision making process to nonmembers. This command is irreconcilable with the First Amendment:

> [T]he freedom to associate . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only. [*Democratic Party of United States v. Wisconsin ex rel LaFollette*, 450 U.S. 107, 122.

See also Rodriquez v. Popular Democratic Party, 457 U.S. 1, 14.]

To compel MCCFA to forego its freedom to limit participation in its deliberations to its members in order to avoid putting nonmembers to a choice between their desire to remain unaffiliated and their desire to be heard by the government is directly to infringe upon associational interests in order to protect against an indirect, remote impact upon nonassociational interests.

B. *Regan v. Taxation with Representation*, *supra*, we submit, confirms the analysis to this point. The Court there decided that, even where *affirmative* interests in expression are asserted, Congress does not impermissibly infringe upon those interests simply by favoring some speech over other speech, as long as the legislature's aim is not to suppress certain ideas:

> [The suggestion] that strict scrutiny applies whenever Congress subsidizes some speech, but not all speech . . . is not the law. Congress could, for example, grant funds to an organization dedicated to combatting teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures. Under *Cammarano v. United States*, [358 U.S. 498], such a statute would be valid. Congress might also enact a statute providing public money for an organization dedicated to combatting teenage alcohol abuse, and impose no condition against using funds obtained from Congress for lobbying. The existence of the second statute would not make the first statute subject to strict scrutiny.
>
> Congressional selection of particular entities or persons for entitlement to this sort of largesse "is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find. *United States v. Realty Co.*, [163 U.S. 427,] 444 [(1896)]." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937). . . . As

> we said in *Maher* [*v. Roe*, 432 U.S. 464], "[c]onstitutional concerns are greatest when the State attempts to impose its will be force of law . . . ." 432 U.S., at 476. Where governmental provision of subsidies is not "aimed at the suppression dangerous ideas," *Cammarrano, supra*, at 513, its "power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher, supra*, at 476. [*Regan v. Taxation with Representation, supra*, 51 L.W., at 4585-86.]

On this basis the Court concluded that Congress could permissibly subsidize by a tax exemption lobbying by veterans' organizations but not lobbying by other non-profit organizations. And the *Regan* Court's reliance on *Maher v. Roe* confirms that the principle declared in the foregoing passage is not limited to tax exemptions but applies to governmental benefits generally.

Regan's reasoning is dispositive here unless the outcome there would have been different if the constitutional claim had been framed in terms of the putative nonassociational rights of nonmembers of veterans' organizations. But the claim of infringement of nonassociational interests through the indirect sort of governmental "inducement" to associate found here is weaker, not stronger, than the claim of government interference with affirmative speech interests rejected in *Regan*.

First, the concept of governmental interference with freedom of belief supposes direct governmental compulsion, and not simply some action by the government which may influence an individual's decision whether to entertain certain ideas. For, as the Court has recognized, governmental "officials may foster [ideological views] by persuasion and example," (*West Virginia Board of Education v. Barnette, supra*, 319 U.S., at 640); *see also Wooley v. Maynard, supra*, 430 U.S., at 717 (the government may seek to communicate "an official view as to proper appreciation of history, state pride, and individualism"; what the government may not do is to force citizens into

"becoming the courier for such a message"). Thus, only where "compulsion [is] employed [as] . . . a means for [the] achievement" of the government's purpose can it be claimed that there has been an intrusion into one's personal beliefs of constitutional magnitude. *Barnette, supra*, 319 U.S., at 640. *See also First National Bank v. Bellotti, supra*, 435 U.S., at 794 n.34.

Second, the freedom to believe as one wishes is most sharply compromised where the very purpose of the government *is* a didactic one of promoting a certain point of view. *Barnette, supra*; *Wooley, supra*. Where, as here, the government instead has another purpose—and particularly where that purpose is itself consonant with promoting a robust dialogue on issues of public concern—the claim that the government seeks to control one's thoughts, and the likelihood that any individual will in fact feel that his or her personal integrity is under seige, lacks a basis in reality. *Pruneyard Shopping Center, supra*, 447 U.S., at 87.

Third, the claim of an invasion of a First Amendment right to freedom of belief is at its strongest when the governmental intrusion is itself direct and intimate, as was the requirement in *Barnette* that children rise on tehir own two feet and utter government prescribed thoughts out of their own mouths. Thus, "the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate." *Wooley, supra*, 430 U.S., at 715. While that difference proved to be "essentially one of degree" in a context in which the government's primary interest was precisely in promoting an official orthodoxy, such a difference becomes one of kind where the government has no such didactic interest and the connection between the individual and the compelled message or association is attenuated. *Pruneyard Shopping Center, supra*. This, presumably, is why tax payers generally cannot claim impairment of their rights of non-

association because some of their tax monies are paid through government grants to organizations of which they disapprove. It is also why the nonmembers who decide to remain nonmembers cannot claim impairment of their nonassociational rights because MCCFA is recognized in the meet and confer process.

Finally, as we have seen (pp. 12-15, *supra*), the claim of a nonassociational right often arises precisely where the government action enhances the associational rights of others, thereby expanding, rather than contracting, the "marketplace of ideas." In such instances, unlike those in which governmental impairment of freedom of belief has been found, "[t]he freedom asserted by these appellees does . . . bring them into collision with rights asserted by . . . other individual[s]." *Barnette*, *supra*, 319 U.S., at 630.

In sum, both the freedom of belief underpinnings of the nonassociational interest concept and the competing "marketplace of ideas" value which inheres in the affirmative associational right protected by the First Amendment counsel that only where the governmental action is (1) compulsory, (2) based on a didactic purpose, (3) affects individuals directly and intimately, and (4) fails to enhance the opportunity for association for expression by some groups without suppressing particular points of view disfavored by the government is such action open to strict scrutiny. Where, as here, the plaintiff fails to show any of these factors the government's power to allocate benefits among citizens and groups recognized in *Regan* must (assuming, of course, a rational basis for the exercise of that power) prevail.

CONCLUSION

For the above-stated reasons, the judgment below should be reversed.

Respectfully submitted,

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No. 82-898-ATX
Status: GRANTED

Title: Minnesota State Board for Community Colleges, et al., Appellants
v.
Leon W. Knight

Docketed:
November 30, 1982

Court: United States District Court
for the District of Minnesota

Vide:
82-977

Counsel for appellant: Miller, Eric R., Mueting, Donald J., Selzer, Donald W.

Counsel for appellee: Vieira Jr., Edwin

Entry	Date	Note	Proceedings and Orders
1	Nov 30 1982	G	Statement as to jurisdiction filed.
2	Nov 30 1982		Appendix of appellant MN Community Colleges filed.
3	Jan 19 1983		DISTRIBUTED. February 18, 1983
6	Feb 4 1983	F	Response requested.
7	Feb 25 1983		Memorandum of appellees Leon W. Knight, et al. filed. VIDED.
8	Mar 9 1983		DISTRIBUTED. March 25, 1983
11	Mar 28 1983		PROBABLE JURISDICTION NOTED. The case is consolidated with 82-977, and a total of one hour is allotted for oral argument.
			**********
13	May 3 1983		Order extending time to file brief of appellant on the merits until June 13, 1983.
14	Apr 28 1983	G	Motion of appellants in No. 82-977 to expand the record and enlarge the questions presented for review filed.
15	May 18 1983		Response of appellees to motion of appellants in 82-977 to expand the record and enlarge the questons filed.
16	May 23 1983		DISTRIBUTED. May 26, 1983. (Motion of appellants in No. 82-977 to expand record & enlarge, etc.)
17	May 23 1983		Response of appellants in No. 82-898 to motion of appellants in No. 82-977 to expand the record and
18	May 23 1983		enlarge the questions presented for review filed.
19	May 31 1983		DISTRIBUTED. 6/2/83. (Motion of appellants in No. 82-977 to expand the rec. & enlarge the questions present.).
20	Jun 6 1983		Motion of appellants in No. 82-977 to expand the record and enlarge the questions presented for review GRANTED.
21	Jun 8 1983		Order further extending time to file brief of appellant on the merits until June 20, 1983.
22	Jun 22 1983		Brief of appellant MN St. Bd. for Comm. Colleges filed.
23	Jun 22 1983		Brief of appellants MN Community College Faculty Assn., et al. filed. VIDED.
24	Jun 22 1983		Brief amicus curiae of AFL-CIO filed. VIDED.
25	Jun 27 1983	G	Motion of American Association of University Professors for leave to file a brief as amicus curiae filed.
27	Jul 11 1983		Order extending time to file brief of appellee on the merits until August 17, 1983.
28	Aug 16 1983		Brief of appellees Leon W. Knight, et al. filed.
29	Jun 22 1983		Joint appendix filed. VIDED.
30	Aug 19 1983		Record filed.
31	Aug 19 1983		Certified original record, 11 boxes, recieved.
32	Aug 23 1983		Motion of American Association of University Professors

No. 82-898-ATX

Entry	Date	Note	Proceedings and Orders
			for leave to file a brief as amicus curiae GRANTED.
33	Aug 30 1983		CIRCULATED.
34	Sep 21 1983		SET FOR ARGUMENT. Tuesday, November 1, 1983. This case is consolidated with No. 82-977. (4th case) (1 hour)
36	Sep 30 1983	D	Motion of appellants in No. 82-977 to strike appellees' brief filed.
37	Oct 3 1983		DISTRIBUTED. Oct. 7, 1983. (Motion of appellants in No. 82-977 to strike appellees' brief).
38	Oct 11 1983		Motion of appellants in No. 82-977 to strike appellees' brief DENIED.
39	Oct 21 1983	X	Reply brief of appellant MN St. Bd. for Comm. Colleges filed.
40	Oct 24 1983	X	Reply brief of appellants MN Community College Faculty Assn., et al. filed. VIDED.
41	Nov 1 1983		ARGUED.